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IN THE

Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Veterans Benefits, Health Care, and Information Technology Act of 2006 provides that contracting officers at the Department of Veterans Affairs "shall award" contracts on the basis of competition restricted to small businesses owned by veterans whenever there is a "reasonable expectation" that two or more such businesses will bid for the contract at "a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). The Federal Circuit, however, relied on a prefatory clause in the statute to limit the application of this mandate to situations in which the Department believes that applying it is necessary to meet the goals that the Department establishes for contracting with veteran-owned small businesses.

The question presented is:

Whether the Federal Circuit erred in construing 38 U.S.C. § 8127(d)'s mandatory set-aside restricting competition for Department of Veterans Affairs' contracts to veteran-owned small businesses as discretionary.

CORPORATE DISCLOSURE STATEMENT

Petitioner Kingdomware Technologies, Inc. has no parent corporation, and no publicly held corporation holds 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Kingdomware Technologies, Inc. respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Federal Circuit (App. 1a-32a) is reported at 754 F.3d 923. The opinion of the Court of Federal Claims (App. 33a-71a) is reported at 107 Fed. Cl. 226.

JURISDICTION

The Federal Circuit entered judgment on June 3, 2014 (App. 1a), and denied Kingdomware's timely peti-

tion for rehearing en banc on September 10, 2014 (App. 73a-74a). The Chief Justice granted two extensions of time to file this petition for a writ of certiorari, ultimately extending the deadline to January 29, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutory provision at issue states:

> (d) USE OF RESTRICTED COMPETITION.—Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127(d). The subsections that immediately precede this provision state:

> (a) CONTRACTING GOALS.—(1) In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities, the Secretary shall—
>
> > (A) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans

who are not veterans with service-connected disabilities in accordance with paragraph (2); and

(B) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans with service-connected disabilities in accordance with paragraph (3).

(2) The goal for a fiscal year for participation under paragraph (1)(A) shall be determined by the Secretary.

(3) The goal for a fiscal year for participation under paragraph (1)(B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)).

(4) The Secretary shall establish a review mechanism to ensure that, in the case of a subcontract of a Department contract that is counted for purposes of meeting a goal established pursuant to this section, the subcontract was actually awarded to a business concern that may be counted for purposes of meeting that goal.

(b) USE OF NONCOMPETITIVE PROCEDURES FOR CERTAIN SMALL CONTRACTS.—For purposes of meeting the goals under subsection (a), and in accordance with this section, in entering into a contract with a small business

concern owned and controlled by veterans for an amount less than the simplified acquisition threshold (as defined in section 134 of title 41), a contracting officer of the Department may use procedures other than competitive procedures.

(c) SOLE SOURCE CONTRACTS FOR CONTRACTS ABOVE SIMPLIFIED ACQUISITION THRESHOLD.—For purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department may award a contract to a small business concern owned and controlled by veterans using procedures other than competitive procedures if—

(1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;

(2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 134 of title 41) but will not exceed $5,000,000; and

(3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

Id. § 8127(a)-(c). The appendix reproduces 15 U.S.C. §§ 644(g) and 657f, 38 U.S.C. §§ 8127-8128, and 48 C.F.R. subpart 819.70. App. 77a-95a.

INTRODUCTION

The United States has long recognized a special obligation to protect and reward those who "drop their own affairs to take up the burdens of the nation" in military service. *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943). This case involves a series of legislative actions, many taken during the nation's most recent armed conflicts, to "honor[] the extraordinary service rendered to the United States by veterans" by ensuring that veterans have a fair opportunity to participate in contracting with the federal government. Exec. Order No. 13,360, 3 C.F.R. 231 (2005). Over a vigorous dissent, the Federal Circuit decision in this case gutted the most important of those provisions. This Court's review is needed to restore the proper interpretation of the statute, which affects thousands of veteran-owned small businesses.

The story behind the decision to adopt the statute at issue began in 1999 when Congress amended the Small Business Act to require the government to set annual goals for awarding contracts to small businesses owned by veterans with service-related disabilities. 15 U.S.C. § 644(g). After nearly every agency—including the Department of Veterans Affairs ("VA")—failed to meet those goals, Congress again amended the Small Business Act in 2003 to permit, but not require, contracting officials to restrict competition for some contracts to small businesses owned by service-disabled veterans. *Id.* § 657f (contracting officers "may award" contracts using limited competition).

In 2006, when that too proved inadequate, Congress enacted the Veterans Benefits, Health Care, and Information Technology Act, Pub. L. No. 109-461, 120 Stat. 3403 ("2006 Veterans Act"), as stand-alone legisla-

tion separate from the Small Business Act. The 2006 Veterans Act focuses solely on the VA and provides that it "*shall* award" contracts on the basis of competition restricted to veteran-owned small businesses whenever the contracting officer reasonably expects that two or more such businesses will bid and that the award can be made at a "fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d) (emphasis added). The only exception to this VA-specific mandate to restrict competition to veteran-owned small businesses provides that a contracting officer "*may* award" certain small contracts directly to a veteran-owned small business using non-competitive procedures. *Id.* § 8127(b), (c) (emphasis added).

A divided panel of the Federal Circuit, however, held that the "mandate" in § 8127(d) applies only when the VA, in its discretion, thinks using the mandate would help the VA meet its annual contracting goals. To reach this conclusion, the panel majority relied on § 8127(a), which requires that the VA Secretary set annual goals for awarding contracts to veteran-owned small businesses, and a prefatory clause in § 8127(d), which states that contracting officers shall award contracts on the basis of restricted competition "'for purposes of meeting the [annual] goals.'" App. 20a. The majority viewed a mandatory mechanism for achieving the Department's annual goals as inconsistent with the Secretary's discretion to set the goals. *Id.*

That holding is deeply flawed. It fails to give effect to § 8127(d)'s plain language and disregards this Court's teaching that "shall" is the language of command, not discretion. It also improperly imbues the prefatory clause of § 8127(d) with an operative force Congress never intended; properly construed, the prefatory clause explains the purpose of the mandate but

does not limit or qualify it. Moreover, the majority's holding rests on the false premise that agency-wide goals are incompatible with a mandatory mechanism for satisfying or even surpassing the goals. Finally, the majority's results-oriented view that the mandate is discretionary "as long as" the annual goals are met leaves the statute potentially unworkable in practice, particularly in circumstances in which the agency fails to meet the goals it sets for itself.

The Federal Circuit hears all appeals from lawsuits against the United States challenging the award of government contracts. The panel majority's atextual construction thus governs VA contracting throughout the country, affecting thousands of veteran-owned and service-disabled veteran-owned small businesses and billions of dollars of VA contracts. If the decision below stands, the nation's veteran-owned small businesses will have far fewer opportunities to contract with the VA than Congress intended. This Court's review is warranted to require the VA to comply with Congress's command.

STATEMENT

The "Rule of Two" is a government contract policy that restricts competition for specified types of government contracts to particular types of businesses when there is a reasonable expectation that two or more such businesses will submit a bid and that the contract can be awarded to one of them at a fair price that offers best value to the United States. This case involves the Rule of Two provision in 38 U.S.C. § 8127(d), which applies to veteran-owned small businesses contracting with the VA.

A. Overview Of Government Procurement

1. Congress has established a general policy that government contracts be awarded based on "full and open competition" through competitive bidding procedures. 41 U.S.C. § 3301(a). The policies and procedures that apply to such acquisitions are set forth in the Federal Acquisition Regulation, 48 C.F.R. ch. 1 ("FAR"). Individual agencies may also "implement or supplement" the FAR with agency-specific regulations. 48 C.F.R. § 1.101. The regulations specific to VA procurements are known as the Veterans Affairs Acquisition Regulation. *Id.* ch. 8.

In some cases, a contracting officer may satisfy the "full and open competition" requirement by purchasing goods or services under a pre-arranged government-wide contract, called a "Federal Supply Schedule" ("FSS"). 48 C.F.R. § 8.404(a). An FSS requires a supplier to commit to "[i]ndefinite delivery" of particular goods or services "at stated prices for given periods of time." *Id.* § 8.402(a). The schedules are typically negotiated by the General Services Administration and are intended to provide contracting officers with a "simplified process for obtaining commercial supplies and services." *Id.* FSS suppliers publish a list of "the items offered pursuant to [the] base contract, as well as the pricing, terms, and conditions applicable to each item." *Sharp Elecs. Corp.* v. *McHugh*, 707 F.3d 1367, 1369 (Fed. Cir. 2013). "Individual agencies issue purchase orders under the base contract as needed." *Id.*

2. Congress often establishes alternative procurement procedures when unfettered open competition would not achieve its ends. For example, the Small Business Act reflects a congressional determination that the nation's economic "security and well-being

cannot be realized unless the actual and potential capacity of small businesses is encouraged and developed," and that doing so requires that small businesses receive "a fair proportion of the total purchases and contracts ... for the Government." 15 U.S.C. § 631(a).

The Small Business Act requires the President to establish annual government-wide goals for the percentage of contracts awarded to small businesses in general and to particular types of small businesses. 15 U.S.C. § 644(g)(1)(A). In turn, each agency must set "an annual goal that presents, for that agency, the maximum practicable opportunity" for contracting with small businesses. *Id.* § 644(g)(1)(B).

Part 19 of the FAR implements the Small Business Act by, among other things, creating procedures to "set aside" some contracts for exclusive participation by small businesses. 48 C.F.R. pt. 19. The principal set-aside mechanism requires a contracting officer to limit competition for a contract to small businesses if the officer has a reasonable expectation that two or more such businesses will submit a bid and that the contract can be awarded to one of them at a fair price. *Id.* § 19.502-2(b). Restricting competition under those circumstances is known generally as applying a "Rule of Two." However, the government-wide set-asides in FAR part 19 are unrelated to the 2006 Veterans Act and the distinct, VA-specific Rule of Two at issue in this case. *See infra* p.17.

The preferences in the Small Business Act for using small business suppliers are discretionary. *E.g.*, 15 U.S.C. § 637(a) (contracting officer "authorized in his discretion" to set aside contracts under § 8(a) program); *id.* § 657a(b) (contracts "may be awarded" to small businesses in historically underutilized business zones).

Consistent with this discretionary language, the FAR expressly provides that the small business set-asides in part 19 do not apply to FSS orders. 48 C.F.R. § 8.404(a) (part 19 "do[es] not apply" to FSS orders); *id.* § 8.405-5 ("the preference programs of part 19 are not mandatory" for FSS orders).

B. Amendments To The Small Business Act For Service-Disabled Veterans

In 1999, after finding that "[t]he United States ha[d] done too little to assist veterans, particularly service-disabled veterans, in playing a greater role in the economy of the United States by forming and expanding small business enterprises," Congress enacted the Veterans Entrepreneurship and Small Business Development Act. Pub. L. No. 106-50, § 101(3), 113 Stat. 233, 234. The 1999 law amended the Small Business Act to require that the President and each agency set annual goals for contracting with service-disabled veteran-owned small businesses—akin to the annual goal-setting already required for small businesses. *Id.* § 502, 133 Stat. at 247 (amending 15 U.S.C. § 644(g)). The government-wide goal must be not less than 3%. 15 U.S.C. § 644(g)(1)(A)(ii).

The purpose of the 1999 law was to spur contracting officers to take a greater interest in awarding contracts to veterans who "sacrificed their health and limbs for our nation." S. Rep. No. 106-136, at 2 (1999); *see* H.R. Rep. No. 106-206, at 14 (1999) (intended to "raise the awareness of federal procurement officials"). By all accounts, that approach failed. Federal agencies, including the VA, fell so far short of the 3% goal—itself just the bare minimum—that the Administrator of the Office of Federal Procurement Policy described the relevant statistics as "disturbing" and "unacceptable."

The State of Veterans' Employment: Hearing before the H. Comm. on Veterans' Affairs, 108th Cong. 22 (2003) (statement of Angela Styles). A VA Deputy Secretary acknowledged that, even having tripled its performance from the year before, the agency was "at 6/10 of 1 percent" in 2002. *H.R. 1460, The Veterans Entrepreneurship Act of 2003 [et al.]: Hearing before the Subcomm. on Benefits of the H. Comm. on Veterans' Affairs*, 108th Cong. 9 (2003) (statement of Leo Mackay, Jr.).

Congress responded to these failures with the Veterans Benefits Act of 2003, which amended the Small Business Act to create an explicit government-wide contracting preference in favor of service-disabled veterans. Pub. L. No. 108-183, § 308, 117 Stat. 2651, 2662. The 2003 Act permits contracting officers to set aside certain smaller contracts for a small business owned by a service-disabled veteran. 15 U.S.C. § 657f(a) ("sole source" awards). A contracting officer also "*may* award contracts on the basis of competition restricted to" service-disabled veteran-owned small businesses when at least two such businesses will submit offers and "the award can be made at a fair-market price." *Id.* § 657f(b) (emphasis added). These set-asides are expressly discretionary.

C. The 2006 Veterans Act

1. The combination of annual goals and discretionary tools proved unsatisfactory. By 2006, the House Committee on Veterans' Affairs—which had initiated both the 1999 and 2003 amendments to the Small Business Act—"remain[ed] frustrated with respect to the efforts of the majority of federal agencies" and with the apparent "culture of indifference" among contracting officers. H.R. Rep. No. 109-592, at 15 (2006). Ra-

ther than amend the Small Business Act yet again, the Committee set out to enact a contracting program specifically tailored to the VA, in recognition of its unique obligation to the nation's veterans. The result was the 2006 Veterans Act. Pub. L. No. 109-461, §§ 502-503, 120 Stat. at 3431-3436 (codified as amended at 38 U.S.C. §§ 8127-8128).

The purpose of the 2006 Veterans Act was for the VA "to set the example among government agencies for procurement with veteran and service-disabled veteran-owned small businesses." H.R. Rep. No. 109-592, at 16; *see H.R. 3082, The Veteran-Owned Small Business Promotion Act of 2005 [et al.]: Hearing before the Subcomm. on Economic Opportunity of the H. Comm. on Veterans' Affairs*, 109th Cong. 29 (2005) ("*2005 Hearing*") (statement of Chairman Boozman) ("It is hard for us to get the other agencies to fall in line if we can't have [the VA] as [a] great model to say, hey, you can do this without the world falling apart.").

Subsection (a) of § 8127 begins by requiring that the VA set annual goals for contracting with veteran-owned and service-disabled veteran-owned small businesses. The goal for service-disabled veteran-owned small businesses must equal or exceed the government-wide goal established by the President under the Small Business Act. 38 U.S.C. § 8127(a)(3).

Congress then made a critical choice in the subsections that followed. Rather than combine those goals with purely discretionary tools—the approach that had failed in the 2003 Act—Congress enacted a VA-specific "Rule of Two" provision stating that VA contracting officers "shall" restrict competition to veteran-owned small businesses:

> Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department *shall* award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127(d) (emphasis added).

The statute contemplates only two exceptions ("[e]xcept as provided in subsections (b) and (c)"), both of which are even more favorable to veteran-owned small businesses than the Rule of Two provision that would otherwise apply. Under § 8127(b), a contracting officer "*may* use procedures other than competitive procedures" to award contracts to veteran-owned small businesses below a threshold amount. 38 U.S.C. § 8127(b) (emphasis added); *see* 41 U.S.C. § 134 (threshold of $100,000). Under § 8127(c), a contracting officer "*may* award a contract to a [veteran-owned small business] using procedures other than competitive procedures" if the contract is above $100,000, but not greater than $5 million; the contracting officer determines the business is a responsible source; and the award can be made at "a fair and reasonable price." 38 U.S.C. § 8127(c) (emphasis added). These exceptions to the Rule of Two in § 8127(d) are discretionary; if the statutory criteria are met, a VA contracting officer "may,"

but need not, use these non-competitive set-asides. If the officer does not, the Rule of Two still applies.[1]

The set-aside procedures dovetail with other provisions of the Act indicating that Congress intended that veteran-owned and service-disabled veteran-owned small businesses would "routinely be granted the primary opportunity to enter into VA procurement contracts." H.R. Rep. No. 109-592, at 14-15. The Act requires the VA to maintain a database of eligible businesses and establishes elaborate certification procedures for inclusion in the database, including penalties for misrepresentation. 38 U.S.C. § 8127(e)-(g).[2] This ensures that VA contracting officers have a ready source of information on eligible suppliers when applying the Rule of Two, and the VA's regulations state that "[w]hen conducting market research, VA contracting teams shall use the ... database." 48 C.F.R. § 810.001. The Act also includes a provision requiring the Secretary to "give priority to a small business con-

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[1] The VA criticized a draft version of these provisions for using "may" and "shall" in a way the agency deemed "inconsistent," and the agency requested that all three subsections be modified to use "may." H.R. Rep. 109-592, at 35 (statement of Gordon H. Mansfield, Deputy Sec'y, VA). Congress retained "shall" in § 8127(d) despite this request.

[2] The certification process was strengthened twice after 2006. *See* Veterans Benefits Act of 2010, Pub. L. No. 111-275, § 104(b)(1), 124 Stat. 2864, 2867; Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 706, 126 Stat. 1165, 1206. Congress also added § 8127(j) to require that agents contracting on the VA's behalf agree "to the maximum extent feasible" to comply with the Act. Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, § 806, 122 Stat. 4145, 4189. That amendment was prompted by perceived efforts by the VA to evade the 2006 Veterans Act by delegating purchasing authority to agents. H.R. Rep. No. 110-785, at 4-5 (2008).

cern owned and controlled by veterans" when choosing suppliers, even if the Secretary is permitted by "any other provision of law" to use a different contracting preference. 38 U.S.C. § 8128(a).

2. The VA adopted regulations to implement the Act in 2009. *VA Acquisition Regulation*, 74 Fed. Reg. 64,619, 64,632-64,633 (Dec. 8, 2009) (codified at 48 C.F.R. subpt. 819.70). These regulations repeat and confirm the mandatory language of the statute, starting with the set-aside for service-disabled veteran-owned small businesses:

> Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer *shall* set-aside an acquisition for competition restricted to [service-disabled veteran-owned small business] concerns upon a reasonable expectation that [the Rule of Two will be satisfied].

48 C.F.R. § 819.7005(a) (emphasis added).

The VA's regulations do *not* limit this mandate based on the prefatory clause in § 8127(d) or the goal-setting provisions in § 8127(a). Instead, the three exceptions in the regulation mirror the exceptions in the statute. One permits a contracting officer to use non-competitive procedures for certain small contracts. 48 C.F.R. § 813.106. The other two recognize that a VA contracting officer "*may* award" contracts on a sole-source basis, as contemplated by § 8127(c). *Id.* § 819.7007(a) (emphasis added) (service-disabled veteran-owned small businesses); *id.* § 819.7008(a) (veteran-owned small businesses). The regulations emphasize that use of the sole-source procedures authorized by § 8127(c) is discretionary, not mandatory: "The contracting officer's determination whether to make a sole source award is a business decision wholly within the

discretion of the contracting officer." *Id.* §§ 819.7007(b), 819.7008(b). There is no analogous provision purporting to make the Rule of Two in § 8127(d) discretionary.

D. *Aldevra* Bid Protests

Notwithstanding the mandatory language of the statute and regulations, the VA continued to place orders from FSS contracts after the passage of the 2006 Veterans Act without first considering whether to conduct a set-aside for veteran-owned small business under the Rule of Two. That practice triggered a slew of bid protests by veteran-owned small businesses.

A bid protest is a written objection by an interested party to a solicitation or other request by an agency for the procurement of property or services. 48 C.F.R. § 33.101. By filing a bid protest, a government contractor challenges a federal agency's violation of procurement statutes or regulations that prejudice the contractor's ability to compete for a specific contract. Bid protests may be filed with the agency conducting the procurement, *id.* § 33.103; the Government Accountability Office ("GAO"), *id.* § 33.104; or the Court of Federal Claims, *id.* § 33.105.

The first bid protest over the VA's continued use of the FSS was filed at the GAO in 2011. *Matter of Aldevra*, 2011 WL 4826148, at *1 (Comp. Gen. Oct. 11, 2011) ("*Aldevra I*"). The VA conceded that the Rule of Two was satisfied for at least one of the disputed procurements—that is, that two or more veteran-owned small businesses could provide the goods at fair and reasonable prices. *Id.* The VA contended, however, that it was not required to conduct the Rule of Two analysis mandated by § 8127(d) because FSS acquisitions are exempted by regulation from certain other

government-wide small business set-asides implemented in FAR part 19. *Id.* at *3; *see supra* pp.9-10.

The GAO rejected the VA's position, observing that both the 2006 Veterans Act and the VA's own implementing regulations "unequivocal[ly]" require the VA to restrict competition to veteran-owned small businesses when the Rule of Two is satisfied. *Aldevra I*, 2011 WL 4826148, at *2. As to the regulations cited by the VA, the GAO explained that the FAR specifically exempts FSS procurements only from the small business set-aside requirements of part 19, such as the government-wide, explicitly discretionary service-disabled veteran-owned small business set-aside authorized by the 2003 law. *Id.* at *3 (discussing 48 C.F.R. § 8.404(a)). By its own terms, that regulatory exemption "has no application to the [2006 Veterans Act]," which is a separate statutory scheme and which is not implemented in FAR part 19. *Id.* at *4.

The GAO confirmed its view in a second bid protest brought by Aldevra in 2012. *Matter of Aldevra*, 2012 WL 860813 (Comp. Gen. Mar. 14, 2012) ("*Aldevra II*"). In that protest, for the first time in "numerous" protests on the same issue, the VA offered a new argument to support its FSS procurements—namely, that because § 8127(d) contains the prefatory clause "for purposes of meeting the goals under subsection (a)," the statute requires use of the Rule of Two only when the VA decides, in its discretion, that a particular procurement should be used to further its annual contracting goals. *Id.* at *3. The GAO also rejected that argument, explaining that the prefatory clause merely "explains the purpose for the mandate" but "does not create an exception to the mandate." *Id.* at *4.

The VA declined to follow the GAO's decision in both of the *Aldevra* bid protests, and in nearly twenty other bid protests on the same issue. GAO Report to Congress, 2012 WL 5510908, at *1 (Comp. Gen. Nov. 13, 2012); *see* CAJA67 (VA's 2011 announcement refusing to follow *Aldevra I*). Although the GAO's resolution of a protest is not binding on a federal agency, 31 U.S.C. § 3554(b), "[a]n agency's decision to disregard a GAO recommendation is exceedingly rare," *CMS Contract Mgmt. Servs.* v. *Massachusetts Hous. Fin. Agency*, 745 F.3d 1379, 1384 (Fed. Cir. 2014), *petition for cert. filed*, No. 14-781 (U.S. Jan. 5, 2015). There have been "fewer than five" such refusals "in the last decade." *Follow-up on the U.S. Department of Veterans Affairs Service-Disabled Veteran-Owned Small Business Certification Process: Hearing before the Subcomm. on Oversight & Investigations & Subcomm. on Economic Opportunity of the H. Comm. on Veterans' Affairs*, 112th Cong. 32 (2011) (statement of Ralph White, Head of GAO Bid Protest Unit). Courts likewise respect the GAO's "'long experience and special expertise'" in resolving such disputes. *CMS*, 745 F.3d at 1384; *see Centech Group, Inc.* v. *United States*, 554 F.3d 1029, 1038 n.4 (Fed. Cir. 2009) (GAO recommendations "instructive in the area of bid protests").

The standoff between the VA and GAO ended in December 2012. The GAO announced that it stood by its interpretation of the 2006 Veterans Act but would no longer hear bid protests on the issue in view of the inability of bid protestors "to obtain meaningful relief" from the VA's unlawful procurements. *Matter of Kingdomware Techs.—Reconsideration*, 2012 WL 6463498, at *2 (Comp. Gen. Dec. 13, 2012).

E. Prior Proceedings

1. Kingdomware is a small business that develops and manages web, software, and database applications for both the public and private sectors. CAJA112. It is owned by Timothy Barton, a veteran who served in the U.S. Army during Operation Desert Storm and sustained a service-related injury that rendered him permanently disabled. The VA has certified Kingdomware as a service-disabled veteran-owned small business. CAJA5 n.1, 351.

Kingdomware filed multiple bid protests at the GAO over the VA's failure to apply the Rule of Two before using the FSS for procurements. CAJA116-118. One of Kingdomware's protests concerned a February 2012 procurement for emergency notification services for a group of VA hospitals and clinics, which the VA awarded to an FSS vendor without attempting to determine whether two or more veteran-owned small businesses could provide the services at fair and reasonable prices that offer best value to the United States. CAJA170-171. The GAO sustained Kingdomware's bid protests. *Matter of Kingdomware Techs.*, 2012 WL 1942256, at *2 (Comp. Gen. May 30, 2012). However, as with the *Aldevra* decisions, the VA refused to follow the GAO's recommendation. CAJA172.

2. Kingdomware then brought this action in the Court of Federal Claims for declaratory and injunctive relief from the VA's refusal to apply § 8127(d)'s Rule of Two before ordering from FSS suppliers. CAJA119-123; *see* 28 U.S.C. § 1491(b)(1) & note (Court of Federal Claims' exclusive jurisdiction over such suits). The VA acknowledged that its contracting officer made no effort to comply with the Rule of Two for the procurement at issue. CAJA171.

The Court of Federal Claims nevertheless granted summary judgment to the VA.[3] Applying the framework of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), the court first found the statute to be ambiguous—based in part on its view that the prefatory clause in § 8127(d) ("for purposes of meeting the goals") and the statute's overall "goal-setting nature" "cloud[ed] the clarity" of the otherwise clear "shall award" language. App. 62a-63a. The court then deferred to the VA's interpretation of the Act as not applying to FSS orders. App. 66a-71a.

3. A divided panel of the Federal Circuit affirmed on different grounds. Unlike the Court of Federal Claims, the panel majority "perceive[d] no ambiguity in § 8127." App. 15a. In its view, the statute "links the Rule of Two mandate (denoted by the word 'shall') in subsection (d) to the goals set under subsection (a)." App. 20a. To put those provisions in what the majority described as "harmonious context" (*id.*), the majority held that "the Secretary 'shall' use Rule of Two procedures" when the VA wishes to use a procurement to meet its annual goals but "may elect to use the FSS at other times so long as the goals are met" (App. 15a). The majority asserted that a contrary reading would render the statutory requirement that the Secretary set goals "superfluous" because the number of contracts awarded to veteran-owned small businesses would be determined not by the goals but rather by "the success or failure of the Rule of Two in the marketplace." App. 20a.

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[3] At the parties' request, the Claims Court also entered judgment on two other claims brought by Kingdomware raising the same legal question as to other procurements. CAJA372.

The majority also relied on extra-record statistics about VA contract awards to veteran-owned and service-disabled veteran-owned small businesses in recent years. The VA submitted those statistics after oral argument based on a request made during argument. The majority accepted and relied on these untested numbers to conclude that the VA had met the annual goals it was required to set for itself. App. 9a. Under that circumstance, the majority saw "no reason to compel" use of the Rule of Two. App. 21a.[4]

Judge Reyna dissented. In his view, the mandatory force of the statutory language "could not be clearer" (App. 23a), and the majority's construction "guts the Rule of Two imperative" of any force (App. 22a). As to the majority's reliance on the phrase "for purposes of meeting the goals," Judge Reyna explained that "'a prefatory clause does not limit or expand the scope of the operative clause.'" App. 26a; *see* App. 22a ("In relying entirely on prefatory language to second-guess Congress, the majority becomes policy maker and departs from our duty to enforce the proper interpreta-

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[4] In fact, the statistics are inaccurate. An audit by the VA's inspector general concluded that the agency had overstated its awards to veteran-owned and service-disabled veteran-owned small businesses in fiscal year 2010—the only year studied—by at least $500 million and possibly more, attributable largely to awarding and counting contracts to ineligible businesses. VA OIG, *Audit of Veteran-Owned and Service-Disabled Veteran-Owned Small Business Programs* 3 (July 25, 2011). The same audit estimated that the VA's actual awards to eligible veteran-owned and service-disabled veteran-owned small businesses in 2010 were "anywhere from 3 to 17 percent" *lower* than reported. *Id.* Accounting for these inaccuracies, the VA may have awarded as few as 6% of its contracts to veteran-owned small businesses in 2010—far short of its reported 23% and its goal of 12%. *Id.* at 32 tbl. 5 (upper limit of error).

tion of the statute regardless of our policy views."). He further explained that the majority's interpretation is undermined by the VA's own regulations, which repeat the mandatory statutory language ("shall award") and *omit* the prefatory clause ("for purposes of"). App. 27a-29a (citing 48 C.F.R. §§ 819.7005-819.7006).[5]

Finally, Judge Reyna addressed the majority's reliance on the goal-setting provisions of subsection (a) In his view, the majority "overlook[ed] that participation goals are aspirations, not destinations," and thus may be exceeded without becoming superfluous. App. 30a. He also faulted the majority for "a misapprehension of the interplay between a Rule of Two analysis and agency-wide goals." App. 31a. The goals are set by the Secretary, but the Rule of Two analysis "is undertaken by the contracting officer on a contract-by-contract basis." *Id.* "Significantly, there is no evidence in the record to show that VA contracting officers rely on, or have access to, these types of data [on whether the agency is meeting its goals] in making contracting decisions[.]" App. 27a. There is thus no practical way "contracting officers can determine that these goals have been 'met' before the end of the fiscal year." App. 32a. Judge Reyna concluded that, far from rendering subsections (a) and (d) harmonious, the majority's decision "deprives the Rule of Two mandate of its force and

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[5] The preamble accompanying the final publication of these regulations asserts that they "do[] not apply to FSS ... orders." 74 Fed. Reg. at 64,624. The VA asked the courts below to defer to that interpretation. U.S. C.A. Br. 30. The majority did not, although the Claims Court did in part. Judge Reyna noted in his dissent that "statements made in a preamble ... cannot override the unambiguous language of the regulations themselves." App. 28a; *see infra* p.31 & n.8 (explaining that the preamble does not support the agency's current litigating position).

effect," "impedes congressional objectives," and "renders § 8127(d) inoperative and unnecessary." *Id.*

The court of appeals denied Kingdomware's petition for rehearing en banc on September 10, 2014. App. 73a-74a.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT'S DECISION DISREGARDS THE PLAIN LANGUAGE OF § 8127(d) AND DRAINS IT OF THE MANDATORY FORCE CONGRESS INTENDED

A. The Decision Contravenes This Court's Teaching That "Shall" Is Mandatory

The Federal Circuit failed to give effect to the plain language of § 8127(d). The statute does not say that contracting officers may elect to use the Rule of Two when they determine, at their discretion, that doing so would be helpful for meeting the Secretary's annual goals. Rather, "[t]he plain language of the 2006 Veterans Act unambiguously requires VA contracting officers to conduct a Rule of Two analysis in every acquisition and does not exempt [FSS orders] from this imperative." App. 22a (Reyna, J., dissenting).

The decision below thus contravenes a basic precept of this Court's precedent: "'The word 'shall' is ordinarily the 'language of command.'" *Alabama* v. *Bozeman*, 533 U.S. 146, 153 (2001) (quoting *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1947)). By contrast, Congress uses "may" in a statute to confer "some degree of discretion." *United States* v. *Rodgers*, 461 U.S. 677, 706 (1983). As the House drafting manual in effect in 2006 stated, "[f]or granting a right, privilege, or power, use 'may' .... For directing that action be taken, use 'shall[.]'" *House Legislative Counsel's Manual on Drafting Style* 61-62 (1995).

To be sure, "[t]his common-sense principle of statutory construction is by no means invariable," and context may sometimes require reading "shall" as discretionary in exceptional circumstances. *Rodgers*, 461 U.S. at 706; *see Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 432 n.9 (1995). But a court has no warrant to "tak[e] such a liberty" with the statutory text when the two words ("shall" and "may") are used "in special contradistinction" to each other in the same law. *United States ex rel. Siegel* v. *Thoman*, 156 U.S. 353, 359 (1895). In that case, the conclusion that "shall" creates a "discretionless obligation[]" is unavoidable. *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001).

Section 8127 uses "shall" and "may" in precisely that contrasting way. Subsection (d) uses "shall" to indicate that application of the Rule of Two is mandatory in all cases, "[e]xcept as provided in subsections (b) and (c)." Those two subsections, by contrast, use "may" to indicate that they *permit*, but do not require, contracting officers to use set-aside authorities other than the Rule of Two in some circumstances.

The panel majority acknowledged the contrasting language in the three set-aside provisions and described the Rule of Two as a "mandate" and as "the required procedure." App. 20a. But its holding collapsed any distinction between the "mandate" in subsection (d) and the discretionary tools in subsections (b) and (c). In the majority's view, to meet the goals set each year, "the Secretary 'shall' use Rule of Two procedures, 'may' use the subsection (b) and (c) contract tools, and may elect to use the FSS at other times so long as the goals are met." App. 15a. That reading robs the distinction between "shall" and "may" of any force. If Congress had meant that a contracting officer "shall" use the Rule of Two unless he or she "elect[s]" not to, it would

have used the term "may" in each subsection—as the VA requested during the legislative process. *See supra* p.14 n.1. It did not, and reading the law as though it did is indefensible.

The inference that Congress used "shall" in deliberate contrast to "may" is further strengthened by considering the predecessors to the 2006 Veterans Act. *See Rodgers*, 461 U.S. at 707 (drawing similar comparison). The Veterans Benefits Act of 2003 created a government-wide Rule of Two set-aside for service-disabled veteran-owned small businesses that was expressly discretionary: A "contracting officer *may award* contracts" to service-disabled veteran-owned small businesses using the Rule of Two. 15 U.S.C. § 657f(b) (emphasis added); *see supra* pp.10-11. Dissatisfaction with that approach led in part to the 2006 Veterans Act, which eschewed the earlier measure's discretionary "may" for the mandatory "shall" while limiting that imperative to the VA. Absent this Court's review, the decision below will nullify Congress's decision to substitute "shall" for "may" when enacting a VA-specific Rule of Two.

B. The Decision Wrongly Transforms Congress's Prefatory Language Into A Loophole

The Federal Circuit sought to avoid the plain meaning of "shall award" by emphasizing that the Rule of Two is to be used "for purposes of meeting the goals" set by the Secretary under § 8127(a). But the majority's reasoning violates the axiom that prefatory clauses do not constrain or enlarge operative clauses, incorrectly assumes that the Rule of Two would render the Secretary's goal setting superfluous, and inserts unnecessary confusion and uncertainty into an otherwise clear statutory requirement.

First, a time-worn principle of statutory interpretation instructs that "a prefatory clause does not limit or expand the scope of the operative clause." *District of Columbia* v. *Heller*, 554 U.S. 570, 578 (2008); *see also, e.g.*, *id.* at 643 n.7 (Stevens, J., dissenting); *Yazoo & Miss. Valley R.R.* v. *Thomas*, 132 U.S. 174, 188 (1889); *Association of Am. R.Rs.* v. *Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *NWF* v. *Marsh*, 721 F.2d 767, 773 (11th Cir. 1983); *Florentine* v. *Church of Our Lady of Mt. Carmel*, 340 F.2d 239, 241-242 (2d Cir. 1965); 2A Singer & Singer, *Statutes and Statutory Construction* § 47:4 (7th ed. 2014).[6] Prefatory language may be used to *resolve* ambiguities in the operative language, *e.g.*, *Heller*, 554 U.S. at 577-578, but it may not be used to "*create* doubt or uncertainty," 2A Singer & Singer § 47:4 (emphasis added). Here, the panel majority manifestly did not consult the prefatory clause ("for purposes of") to resolve ambiguity in the operative language ("shall award"). Instead, it rejected Kingdomware's unambiguous "plain meaning interpretation" in order to imbue the prefatory clause with a limiting force Congress never intended. App. 20a. This violates the rule that "operative provisions should be given effect as operative provisions, and prologues as prologues." *Heller*, 554 U.S. at 578 n.3.[7]

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[6] The principle often arises with respect to statutory preambles but applies to statements of purpose regardless of location. *See, e.g.*, *Heller*, 554 U.S. at 577-578 (applying rule to prefatory clause of Second Amendment); Scalia & Garner, *Reading Law* 220 (2012) (limitation on the use of expressions of purpose in a statute applies whether language appears in the preamble or "in an adverbial phrase modifying the operative language").

[7] The panel majority's flawed interpretation does not even resolve the problem that purportedly motivated it—avoiding superfluous statutory language. App. 20a. The same prefatory clause

Second, the Federal Circuit's belief that a mandatory Rule of Two analysis would make the goal-setting provision "superfluous" (App. 20a) is clearly incorrect. There is no inconsistency between setting goals and requiring VA contracting officers to use a particular procedure to meet, if not exceed, those goals. The majority's contrary view improperly treats the goals as a ceiling rather than a floor.

Moreover, the Rule of Two does not guarantee that any particular contract or any particular percentage of contracts will actually be awarded to veteran-owned small businesses. In fact, it applies only when it is expected that "two or more small business concerns owned and controlled by veterans will submit offers" and "the award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). Thus, even under a mandatory Rule of Two, the goals provide an important backstop if the Rule of Two falls short.

For example, the goals may help determine whether the VA uses the non-competitive procedures in § 8127(b) and (c), which are even more favorable to veteran-owned small businesses than the Rule of Two but, unlike that rule, are expressly discretionary. The goals may also inform how the VA trains and supervises contracting officers and the priorities the VA leadership communicates, both of which can shape the way the Rule of Two is implemented. The goals also promote transparency, oversight, and accountability for the VA

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appears in subsections (b) and (c), which are *already* discretionary by their terms. If the prefatory clause were meant to limit the force of the mandatory language in subsection (d), it would be entirely superfluous to include the same clause in subsections (b) and (c).

leadership if the agency falls short of its aspirations. Congress thus sensibly concluded that it was necessary to mandate both that the Secretary "shall" set goals and that, unless the non-competitive procedures of § 8127(b) and (c) are applied, VA contracting officers "shall" apply the Rule of Two.

Third, the court of appeals' reliance on the prefatory clause has created unnecessary confusion about how the Act operates in practice. The majority held that the Rule of Two is not mandatory "as long as the goals set under subsection (a) are met." App. 20a. It offered no guidance as to whether or when the Rule of Two might become mandatory if the VA falls short of its goals. Judge Reyna noted that there is no evidence in the record to suggest that VA contracting officers even have a mechanism to know whether the agency is meeting its goals when conducting a particular procurement. App. 32a. Indeed, the statistics on which the majority relied to show that the VA is meeting its goals are flawed. *Supra* p.21 n.4. These practical and procedural problems contrast starkly with the simplicity of Congress's straightforward command that VA contracting officers "shall" use the Rule of Two.

C. The Decision Misreads The Context And Legislative History Of The 2006 Veterans Act, Which Confirm That Congress Mandated Use Of The Rule Of Two

The context and legislative history of the 2006 Veterans Act confirm that VA contracting officers are required to use the Rule of Two. The Federal Circuit's misreading of that history further supports review by this Court.

Congress enacted the 2006 Veterans Act out of frustration with years of failure by federal agencies to

meet existing veteran-contracting goals. H.R. Rep. No. 109-592, at 15. At the time, all federal agencies—including the VA—*already* had discretionary set-aside authority to use the Rule of Two to restrict competition to service-disabled veteran-owned small businesses and were *already* required to set annual goals for awarding contracts to such businesses. *See supra* pp.10-11 (discussing 1999 and 2003 amendments to the Small Business Act).

Against that backdrop, Congress sought to create a special, VA-specific program that would cause the agency "to set the example among government agencies," H.R. Rep. No. 109-592, at 16, and that would ensure that veteran-owned and service-disabled veteran-owned small businesses are "*routinely* ... granted the *primary opportunity* to enter into VA procurement contracts," *id.* at 14-15 (emphases added). Furthermore, while Congress was crafting the relevant language, the VA requested that each set-aside subsection use the word "may," but Congress retained "shall" in subsection (d). *See id.* at 35 (statement of Gordon H. Mansfield, Deputy Sec'y, VA).

The Federal Circuit disregarded the natural inference that Congress did not intend to create simply another discretionary tool. The majority instead cherry-picked portions of the legislative history that appear to blame the VA's previous failures to meet its goals on "'the discretionary, not mandatory, nature of the goals.'" App. 20a (quoting H.R. Rep. No. 109-592, at 15). Those statements do not support the panel majority's strained reading of the statute; they show, at most, that legislators were frustrated that the VA had failed to achieve its goals when doing so was discretionary and that a new approach was necessary—hence the mandatory language of § 8127(d). *See, e.g., 2005 Hear-*

ing, 109th Cong. 2 (statement of Chairman Boozman) ("to date, virtually no Federal agency, including the VA" has met the annual contracting goals, the intent of the bill "is to rectify that as far as the VA is concerned," and the bill "will essentially change what has been a 'may' to a 'shall' in terms of goals").

D. The VA's Own Regulations Support The Mandatory Nature Of The Rule Of Two

Under *Chevron*, the first question a reviewing court confronts is whether, "applying the ordinary tools of statutory construction, ... 'the intent of Congress is clear'" from the statutory text. *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868 (2013) (quoting *Chevron*, 467 U.S. at 842-843). If so, "'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Id.* Here, there is nothing ambiguous about Congress's command in § 8127(d) that VA contracting officers "shall award" contracts using the Rule of Two. The Court may therefore grant the petition and reverse the Federal Circuit's flawed interpretation of the statute without going beyond *Chevron* step one.

But even if there were some reason to go beyond this first step, applying the second step of the *Chevron* analysis merely confirms the error of the decision below and the need for this Court's review. The majority's strained effort to resolve the case in the VA's favor at the first step of *Chevron* is no accident. Had the majority found § 8127(d) ambiguous, it would have proceeded under the second step of *Chevron* to consider whether the agency had reasonably exercised its delegated authority to resolve the ambiguity. That second step is problematic for the majority's view because the VA's implementing regulations *omit* the very language

on which the panel majority relied—namely, the prefatory clause, "for purposes of meeting the goals"—and simply state that the VA "shall" apply the Rule of Two. 48 C.F.R. §§ 819.7005(a), 819.7006(a); *supra* pp.15-16.

Thus, even the VA did not argue that its regulations required the interpretation adopted by the majority. Instead, the VA argued for *Chevron* deference based on an interpretation of the 2006 Veterans Act given in a preamble to its final rulemaking, which stated that "this rule does not apply to FSS task or delivery orders." U.S. C.A. Br. 30 (citing 74 Fed. Reg. at 64,624).[8] The preamble, however, is not owed *Chevron* deference for multiple reasons. First, the preamble lacks the force of law, which is a necessary prerequisite to *Chevron* deference. *Wos* v. *E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1402 (2013). Second, and relatedly, "language in the preamble of a regulation is not controlling over the language of the regulation itself." *Wyoming Outdoor Council* v. *U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999). Third, the preamble appeared for the first time in commentary on the final rule "without offering ... interested parties notice or opportunity for comment." *Wyeth* v. *Levine*, 555 U.S. 555, 577 (2009).

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[8] The preamble reasoned that the VA need not comply with the Rule of Two in § 8127(d) before placing an FSS order because FSS orders are governed by the FAR, which "states that [small business] set-asides do not apply to ... FSS acquisitions." 74 Fed. Reg. at 64,624. The GAO correctly perceived that these provisions of the FAR have no bearing on whether § 8127(d) itself requires the VA to apply the Rule of Two before proceeding to any other permissible procurement procedure. *Aldevra I*, 2011 WL 4826148, at *4. The set-asides discussed in the preamble (from which FSS orders are exempted) implement the earlier government-wide 2003 law, not the VA-specific 2006 Veterans Act. *Supra* p.17.

Even without these shortcomings, the preamble does not actually address the ambiguity the VA now perceives in § 8127(d). The preamble's discussion of the FSS makes no mention of subsection (a) or of the phrase "for purposes of meeting the goals under subsection (a)." It therefore provides no support for the Federal Circuit's decision.

E. Statistics Concerning The VA's Performance Do Not Excuse Its Failure To Comply With § 8127(d)

The panel majority's conclusion that "there is no reason to compel" the VA to use the Rule of Two rested in part on the majority's belief that the agency is already meeting the annual goals it sets for itself. App. 21a. That is not a proper reason to disregard § 8127(d)'s mandatory language. In any event, the panel majority's apparent belief that use of the Rule of Two was unnecessary as a policy matter was mistaken.

First, the VA's success in meeting its own goals is questionable. The VA's Inspector General has found—and reported to Congress—that the agency overstated the contracts it awarded to veteran-owned and service-disabled veteran-owned small businesses. *Supra* p.21 n.4. In at least some recent years, it may have failed to meet its goals.

Second, even if the VA had met its goals, they are merely goals. As Judge Reyna explained, "participation goals are aspirations, not destinations." App. 30a; *see also id.* (noting that contracting officers are required to use other small business set-asides, if applicable, even after annual goals are met). Meeting a goal the VA may adjust for itself is not a compelling reason to dispense with Congress's mandate to use the Rule of Two. In fact, in fiscal year 2013, the VA was not even

the leader among federal agencies in contracting with veteran-owned small businesses, in percentage terms. It was bested by, among others, the FCC, the federal judiciary, and USAID. GSA, *Small Business Goaling Report: Fiscal Year 2013*, at 1 (2014).

Third, even if the VA has met its goals to date, there is no guarantee that it will continue to do so. The long history of Congress's frustration with the agency before the 2006 Veterans Act suggests there is a significant likelihood the agency will fail to meet its goals at some point, if it has not already done so. In that event, the majority's results-driven approach leaves the operation of the statute entirely unclear. *Supra* p.28.

II. The Question Presented Is Important To The Nation's Veterans

A. The Federal Circuit's Flawed Interpretation Sets A National Rule

The Federal Circuit's flawed interpretation of the 2006 Veterans Act affects thousands of veterans across the nation and cannot be reconsidered, qualified, or countered by any Court save this one. This Court should grant review to restore the proper interpretation of the statute.

The only lower courts or agencies that could consider the question presented have done so. The Court of Federal Claims has exclusive jurisdiction to hear suits against the United States concerning "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C.

§ 1491(b)(1).[9] The Federal Circuit in turn has exclusive jurisdiction over appeals from the Court of Federal Claims. *Id.* § 1295(a)(3). Thus, even though the GAO rejected the VA's view, it has announced that it will no longer hear bid protests on the issue. *Supra* p.18.

The tools that Congress gave the Federal Circuit to maintain uniformity also amplify the court's errors and inconsistencies. Where, as here, the Federal Circuit deviates from sound practice and this Court's precedents, it is incumbent on this Court to intervene. That is particularly true on a question of statutory interpretation that affects numerous individuals and businesses.

This Court has repeatedly granted review to consider decisions of the Federal Circuit involving the interpretation of statutes in cases appealed exclusively to that court. *E.g.*, *Sebelius* v. *Cloer*, 133 S. Ct. 1886 (2013); *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428 (2010); *United States* v. *Eurodif S.A.*, 555 U.S. 305 (2009). The need for review in this case is even more compelling.

B. The Decision Below Affects Billions Of Dollars In Contracting Opportunities For Veteran-Owned And Service-Disabled Veteran-Owned Small Businesses

If permitted to stand, the Federal Circuit's interpretation of the 2006 Veterans Act will result in substantially fewer opportunities for small businesses owned by veterans and service-disabled veterans than Congress intended. The VA procures approximately

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[9] The text of § 1491(b)(1) continues to refer to concurrent jurisdiction in the district courts, but that jurisdiction terminated in 2001. *See id.* § 1491 note (sunset provision).

$18 billion of goods and services annually, making it one of the single most important sources of government contracts. Nat'l Contract Mgmt. Ass'n, *2013 Annual Review of Government Contracting* 5 (2014). It has acknowledged that it "purchases approximately 60 percent of its goods and services through the FSS." 74 Fed. Reg. at 64,624. The VA is thus exempting more than $10 billion of procurements from the scope of the 2006 Veterans Act without any legal authority for this action. Nothing in the text or legislative history of the Act suggests that Congress contemplated such a loophole. Indeed, under the construction of the law adopted by the Federal Circuit, *not a single VA procurement* is necessarily subject to the Rule of Two.

The VA's invention of this loophole (and the Federal Circuit's blessing of it) cannot be defended as a measure to defend the public treasury. Taxpayers are automatically protected by the statute. Under the Rule of Two, competition is only restricted if there is a reasonable expectation that the award will be made "at a *fair and reasonable price* that offers *best value to the United States*." 38 U.S.C. § 8127(d) (emphases added). Nor will contracting officers be overburdened if required to consider the Rule of Two. The 2006 Veterans Act requires the VA to maintain a database of eligible veteran-owned and service-disabled veteran-owned small businesses. This database ensures that contracting officers already have at their fingertips a list identifying companies eligible for consideration under the Rule of Two. *Supra* p.14.

It can be difficult for any small business to get off the ground, particularly a small business owned by a service-disabled veteran or a veteran just reintegrating into civilian life. Inertia favors existing suppliers. Congress recognized that the VA has a unique duty to

shake off that inertia and to create opportunities for such businesses to establish themselves.

The Federal Circuit's decision threatens those opportunities and the ability of veteran-owned and service-disabled veteran-owned small businesses to obtain government contracts with other federal agencies. A central purpose of the 2006 Veterans Act was to transform the VA into a model agency to "set the example among government agencies for procurement with" veteran-owned and service-disabled veteran-owned small businesses. H.R. Rep. No. 109-592, at 16; *see supra* p.12. That purpose will be defeated if the VA is encouraged to do the bare minimum to meet its goals.

The loss to America's veterans from the Federal Circuit's decision will be significant. Veterans represent a unique cross-section of all Americans, and their military service poses a unique challenge for operating a small business. Recent veterans in particular struggle to rejoin the economy after their service ends. For example, the unemployment rate for veterans who have completed their military service since September 11, 2001, is nearly a quarter higher than for non-veterans. Hicks, *Youngest Veterans Struggle Most With Unemployment, Data Shows*, Wash. Post, Nov. 11, 2014. The VA's interpretation of the 2006 Veterans Act works at cross-purposes with its mission to serve veterans and to assist in reintegrating them into the economic fabric of the country.

America's veterans have made tremendous sacrifices for their country. This Court's review is urgently needed to ensure that the Federal Circuit's flawed statutory interpretation does not deprive them of important opportunities that Congress created to help veteran-owned small businesses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2015

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2013-5042

KINGDOMWARE TECHNOLOGIES, INC.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

June 3, 2014

[754 F.3d 923]

* * *

Before PROST, *Chief Judge*,* CLEVENGER, and REYNA, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* CLEVENGER.

Dissenting opinion filed by *Circuit Judge* REYNA.

CLEVENGER, *Circuit Judge*.

This is an appeal from the final judgment of the United States Court of Federal Claims ("Court of Federal Claims") on a matter of statutory construction.

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* Sharon Prost assumed the position of Chief Judge on May 31, 2014.

The Court of Federal Claims ruled in favor of the United States, *Kingdomware Techs., Inc. v. United States*, 107 Fed. Cl. 226 (Fed. Cl. 2012), and Kingdomware Technologies, Inc. ("Kingdomware") appeals. For the reasons set forth below, we affirm the final judgment of the Court of Federal Claims.

I

Kingdomware is owned and controlled by a service-disabled veteran. The Department of Veterans Affairs ("VA") certified Kingdomware as a service-disabled veteran-owned small business in September 2010 and recertified Kingdomware in September 2012.

It has long been the policy of the United States to promote small businesses, including small businesses owned and controlled by veterans. Congress has expressed this policy through the Small Business Act, 15 U.S.C. ch. 14A, and stated its expectation that small businesses generally will receive "a fair proportion of the total purchases and contracts for property and services for the Government ...." 15 U.S.C. § 644(a)(3). Veteran-Owned Small Businesses ("VOSBs") and Service-Disabled Veteran-Owned Small Businesses ("SDVOSBs") are expressly recognized in the Small Business Act. *Id.* § 632(q).

The policy directive to promote small businesses lies within the statutes and regulations that guide Government contract formation. The general policies and procedures for Government contracting are contained in the Federal Acquisition Regulation ("FAR"), 48 C.F.R. ch. 1, which implements the Office of Federal Procurement Policy Act of 1974, 41 U.S.C. ch. 7. Certain agency-specific contract regulations are established agency by agency, and contract regulations spe-

cific to the VA are stated in the Veterans Affairs Acquisition Regulation ("VAAR"), 48 C.F.R. ch. 8.

The overarching policy of the FAR generally demands that "[c]ontracting officers shall provide for full and open competition." 48 C.F.R. § 6.101(b). The Federal Supply Schedule ("FSS") exists as one of the tools for achievement of the overarching policy. The FSS was established by the General Services Administration ("GSA") to provide Government agencies with a "simplified process for obtaining commercial supplies and services at prices associated with volume buying." *Id.* § 8.402(a). FSS contractors agree to provide goods and services on the FSS at stated prices for given periods of time, thus permitting agencies to buy supplies and services directly from the FSS, rather than using traditional full and open competition contract tools for such purposes. FSS contracts are deemed to satisfy the conditions of full and open competition. *Id.* § 8.404(a).

Unless otherwise specified by statute or regulation, an agency has wide discretion to decide the method of contracting to use, including the FSS. *Tyler Constr. Grp. v. United States*, 570 F.3d 1329, 1334 (Fed. Cir. 2009). The FAR specifies as a matter of contracting priority that an agency is encouraged to obtain goods and services from FSS contractors before purchasing from commercial sources, which include privately owned VOSBs and SDVOSBs. 48 C.F.R. § 8.004. The GSA considers its FSS program to be "the premier acquisition vehicle in government," accounting for 10% of overall procurement spending. *For Vendors—Getting on Schedule*, GENERAL SERVICES ADMINISTRATION (May 29, 2014), http://www.gsa.gov/portal/content/198473.

The FAR explicitly states that an agency placing an order against the FSS is exempt from requirements of the small business set-aside programs under FAR part 19. *See* 48 C.F.R. §§ 8.404(a), 8.405-5(a), 19.502-1(b). This exemption does not affect the VA's obligation under 48 C.F.R. § 19.502-1(a) otherwise to set aside contracts for competition among small businesses. "Although GSA awards most [FSS] contracts, it may authorize other agencies to award schedule contracts and publish schedules." *Id.* § 38.101(d). GSA has specifically delegated authority to the VA to procure medical goods and services under the VA Federal Supply Schedule Program. *Id.* § 38.000. For other goods and services, the VA uses the GSA FSS program. As a matter of policy, the VA encourages VOSBs and SDVOSBs to participate in the FSS program. Press Release, Dept. of Veterans Affairs, Statement on VA Veteran-Owned Small Business Contract (Oct. 28, 2011). Purchasing goods and services through the FSS is important to the VA and to VOSBs: in 2011, the VA used FSS contracts for 20% of its total spending, and 13% of these FSS expenditures went to VOSBs. Kathleen Miller, *Dispute Simmers Between VA and Veteran-Owned Small Businesses*, WASH. POST, Nov. 14, 2011, at A20.

II

In 1999, Congress amended the Small Business Act to establish an aspirational Government-wide goal of awarding 3% of Government contracts to SDVOSBs. 15 U.S.C. § 644(g). History shows this 3% goal was not satisfied. For the 2001 fiscal year, SDVOSBs received but 0.24% of federal contract funds. *The State of Veterans' Employment: Hearing Before the H. Comm. on Veterans Affairs*, 108th Cong. 92 (2003) (statement of Angela B. Styles, Adm'r Fed. Procurement). And the VA awarded only 0.1% of its contracts to SDVOSBs in 2000,

0.2% in 2001, and 0.6% in 2002. *H.R. 1460, The Veterans Entrepreneurship Act of 2003; H.R. 1712, The Veterans Federal Procurement Opportunity Act of 2003; and H.R. 1716, The Veterans Earn and Learn Act: Hearing Before the Subcomm. on Benefits of the H. Comm. on Veterans Affairs*, 108th Cong. 9 (2003) (statement of Leo Mackay, Deputy Sec'y of Veterans Affairs).

Congress again amended the Small Business Act in 2003 to focus on SDVOSBs. The 2003 Act grants discretionary authority ("a contracting officer may award") to contracting officers, Government-wide, to award sole-source contracts of restricted dollar amounts to SDVOSBs when the contracting officer estimates receipt of a fair and reasonable price, and otherwise to award contracts on the basis of competition restricted to SDVOSBs "if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price." 15 U.S.C. § 657f. The discretionary authority to award contracts beyond the limited dollar amount specified for sole-source contracts requires satisfaction of the Rule of Two, a procedure well-known throughout the Government in connection with award of contracts set aside for competition restricted to small businesses.

History again showed a failure to achieve the goal of the Small Business Act to award 3% of Government contacts to SDVOSBs: only 0.605% of Government contracts went to SDVOSBs in 2005. H.R. REP. NO. 109-592, at 16 (2006) ("H.R. REP."). Consequently, in 2006 Congress returned to the subject of preferences for businesses owned and controlled by veterans, enacting a statute specifically and only directed to the VA. While the Small Business Act and previous amend-

ments contained provisions relating only to SDVOSBs, the 2006 Veterans Act expanded the reach of the small business provisions to include both VOSBs and SDVOSBs.

In particular, Congress mandated that the Secretary of the VA "shall" establish a goal for each fiscal year for participation in VA contracts by VOSBs, and "shall" establish a goal for participation in VA contracts by SDVOSBs which "shall not be less" than the Government-wide goal set by the Small Business Act, which remained at 3%. 38 U.S.C. § 8127(a).

The Veterans Act of 2006, codified at 38 U.S.C. § 8127, gives contracting officers in the VA certain specific tools in subsections (b), (c), and (d) for achieving the goals to be set by the Secretary. As the House Report accompanying the statute explained: "[g]iven this new set of acquisition tools, there should be no reason for VA not to meet the veteran and service-disabled veteran small business contracting goals." H.R. REP., at 16.

For VA acquisitions for amounts less than what is called the simplified acquisition threshold (currently $150,000), § 8127(b) states that "a contracting officer [of the VA] may use procedures other than competitive procedures." Contracts under $150,000 can thus be sole-sourced to VOSBs and SDVOSBs without regard to the marketplace competitiveness of the price. Second, for contracts worth $150,000 up to $5,000,000, VA contracting officers "may" use procedures other than competitive procedures to grant sole-source contracts to VOSBs and SDVOSBs if the particular business concern (1) "is determined to be a responsible source with respect to performance of such contract opportunity"; and (2) "in the estimation of the contracting officer, the

contract award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(c). The authority given to VA contracting officers in subsections (b) and (c) of § 8127 is expressly "for purposes of meeting the goals under subsection (a)." Third, Congress also authorized use of restricted competition procedures by VA contracting officers. Thus, in addition to the noncompetitive methods authorized in subsections (b) and (c), Congress specified as follows in subsection (d):

> (d) USE OF RESTRICTED COMPETITION.—Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the [VA] shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

Id. § 8127(d) (reciting the Rule of Two within the "if" clause).

As an assist for achieving the goals under subsection (a), Congress ordered the VA in subsection (i) to give contracting priority to SDVOSBs and VOSBs over other small business entities. *Id.* § 8127(i). Thus, SDVOSBs and VOSBs enjoy primary opportunities over other small businesses.

The VA promulgated regulations for § 8127(d). Unlike that subsection, which does not distinguish be-

tween VOSBs and SDVOSBs, the VA provided a separate regulation for each group, repeating in each regulation the statutory language that the contracting officer shall award contracts according to the Rule of Two. 48 C.F.R. § 819.7005 (providing for SDVOSBs); § 819.7006 (providing for VOSBs). The regulations further specify that contracting officers must give preference to SDVOSBs over VOSBs, and if only one SDVOSB makes an offer at a fair and reasonable price, the contracting officer "should make" the award to that offeror (thus converting the Rule of Two to a Rule of One). *Id.* § 819.7005. If no acceptable offer is made by a SDVOSB, the contracting officer "shall" withdraw the SDVOSB set-aside and process the procurement as a VOSB set-aside. *Id.* If only one VOSB makes a fair and reasonable price offer, the contract officer "should make" the award to that offeror, and if no acceptable offer is made, the contracting officer "shall" process the procurement under other small business set-aside programs. *Id.* § 819.7006. In the preamble to the regulations, the VA expressed its view that 38 U.S.C. § 8127(d) "does not apply to FSS task or delivery orders" and that the VA would "continue to follow GSA guidance regarding applicability of 48 CFR part 19 of the FAR, Small Business Programs, which states that set-asides do not apply to FAR part 8 FSS acquisitions." 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009). In practice, the VA has continuously and consistently interpreted § 8127(d) as not affecting its authority to place orders under the FSS, and as granting it the flexibility to achieve the subsection (a) goals by any of the three § 8127 methods.

History has proven true the prediction made in the legislative history of § 8127. The 2006 Act did not become effective until 180 days after its enactment on De-

cember 22, 2006, and as a result was not fully implemented until the 2008 fiscal year. For that year and thereafter, the Secretary set goals well beyond the previous 3% Government-wide goal for SDVOSBs, and achieved well beyond his stated goals, as shown below.

Year	VOSB Goal	VOSB Attainment	SDVOSB Goal	SDVOSB Attainment
2008	10%	14.89%	7%	11.78%
2009	10%	19.98%	7%	16.96%
2010	12%	23.08%	10%	20.05%
2011	12%	20.50%	10%	18.22%
2012	12%	21.77%	10%	19.24%

Memorandum from James B. Peake, Sec'y of Veterans Affairs, to Under Sec'ys, Assistant Sec'ys, Other Key Officials, Deputy Assistant Sec'ys, and Field Facility Directors (Jan. 28, 2008); Memorandum from Eric K. Shinseki, Sec'y of Veterans Affairs, to Under Sec'ys, Assistant Sec'ys, Other Key Officials, Deputy Assistant Sec'ys, and Field Directors (May 7, 2010); Memorandum from Eric K. Shinseki, Sec'y of Veterans Affairs, to Under Sec'ys, Assistant Sec'ys, Other Key Officials, Deputy Assistant Sec'ys, and Field Directors (Feb. 21, 2012); Summary of Veterans Affairs Veteran Owned Small Business Goals Achieved for FY 2006 through FY 2012 (Mar. 18, 2014).

III

This suit arises from the following undisputed facts. In early 2012, the VA decided to implement an Emergency Notification Service in several of its medical centers. The VA contracting officer chose to use the GSA

FSS to procure the needed services, and awarded the contract to a FSS vendor which was not a VOSB. On March 14, 2012, Kingdomware, a certified SDVOSB and qualified FSS contractor, filed a bid protest with the Government Accountability Office ("GAO"). Kingdomware challenged the contract award as illegal on the ground that § 8127(d) always bars the VA from using the FSS without first invoking the Rule of Two and if satisfied, awarding the contract pursuant to the Rule of Two. The VA argued that subsection (d)'s requirement to invoke this Rule of Two applies only when the VA determines that this is necessary to meet the established contracting goals. The GAO, relying on its opinion in a previous case, *Aldevra*, B-406205, 2012 CPD ¶ 112 (Comp. Gen. Mar. 14, 2012), rejected the VA's argument, and issued a recommendation decision that the VA cancel the contract award already made and resolicit the requirement as a SDVOSB set-aside, *Kingdomware*, B-406507, 2012 CPD ¶ 165 (Comp. Gen. May 30, 2012).

The VA soon after responded to the GAO and Kingdomware, announcing that it would not acquiesce in GAO's recommendation decision. The VA was on firm ground in refusing to accept the GAO decision. Although agencies often follow GAO recommendations in bid protest decisions "given the GAO's long experience and special expertise in such ... matters," *CMS Contract Mgmt. Servs. v. Massachusetts Hous. Fin. Agency*, 745 F.3d 1379, 1384 (Fed. Cir. 2014) (internal citation omitted), these recommendations are not binding on an agency. *See Honeywell, Inc. v. United States*, 870 F.2d 644, 647-648 (Fed. Cir. 1989) (noting that the provisions of the Competition in Contracting Act "do not compel procuring agencies to obey the recommendation of the Comptroller General ...." (internal citation

omitted)). By enforcing its long-standing interpretation of § 8127(d), the VA set the stage for Kingdomware's retreat to the United States Court of Federal Claims.

IV

Kingdomware filed its complaint on March 15, 2012. The parties stipulated to the facts as presented here and cross-moved for summary judgment. Both parties claimed victory on the plain meaning of § 8127(d). Kingdomware argued that the word "shall" in the statute is an unambiguous imperative that the Secretary can never use the FSS where the Rule of Two may be satisfied. The VA responded that Kingdomware's view writes out of the statute its obligation to set the goals for VOSB contract awards because a mandatory set-aside requirement for all contracts would obviate the need for the Secretary to establish goals. The VA argued that all the words in § 8127 have to be accounted for, and that "for the purposes of meeting the goals under subsection (a)" language in subsection (d) gives clear meaning to the "shall" imperative to use the Rule of Two procedure: § 8127(d) properly understood only compels the VA to conduct a Rule of Two analysis when the Secretary determines that doing so is necessary to meet the goals set by him under subsection (a).

The Court of Federal Claims reasoned that Kingdomware's interpretation of § 8127(d) is not supported by the plain language of the statute because it does not account for the mandatory goal-setting requirements of the section and the command that the Rule of Two procedure be used "for purposes of meeting the goals." Without addressing the VA's plain meaning interpretation, the Court of Federal Claims ruled that "the goal-setting nature of the statute clouds the clarity plaintiff would attribute to the phrase 'shall award' in subsec-

tion (d) of the Act, and renders the Act ambiguous as to its application to other procurement vehicles, such as the FSS." *Kingdomware*, 107 Fed. Cl. at 241.

Having found ambiguity in subsection (d) under the first step of the analysis laid out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court of Federal Claims then assessed the reasonableness of the VA's consistent interpretation of the statute, which was first expressed in the preamble of the regulations promulgated for the 2006 Act after notice and comment rule-making, and since articulated in policy statements, *see, e.g.*, Press Release, Dept. of Veterans Affairs, Statement on VA Veteran-Owned Small Business Contract (Oct. 28, 2011), and in litigation. Because the regulations themselves do not expressly state that the subsection does not apply to the FSS, the court declined *Chevron* deference to the VA's interpretation. But since the regulations only recite statutory language verbatim, and that language was found ambiguous, and because the regulations are wholly silent as to what role the FSS might play in meeting the goals set by the Secretary, the court considered granting deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), to the clear statement of the VA's interpretation in the regulations' preamble.

The Court of Federal Claims concluded that the VA's interpretation has many of the blazemarks favoring deference under *Skidmore*. First, the VA's view that § 8127 does not apply to the FSS has been consistent over time, reflecting a uniform administrative and litigation stance by the VA. Second, the VA's view is not directly in conflict with the words of the statute or the regulations, both of which are silent on the role of the FSS in meeting the Secretary's goals. Also, the

legislative history of the statute expressed an intent that the VA retain the "option" to award contracts to SDVOSBs and VOSBs, and would "exercise reasonable judgment" in meeting the required set-aside goals alongside the VA's obligation to satisfy small business awards to other groups, such as women's owned businesses. 152 Cong. Rec. S11609-03, S11615, S11616 (Dec. 8, 2006). Third, the VA's interpretation as stated in the preamble of the regulations is crystal clear and was made in the context of notice and comment rulemaking. Finally, the court noted that the VA's interpretation is consistent with the Government-wide traditional relationship between set-asides for small businesses and the FSS as found in the FAR, namely that agencies are not required to implement small business set-aside programs before or while using the FSS. The Court of Federal Claims thus found the VA's interpretation sufficient to warrant deference. Accordingly, the VA's cross-motion for summary judgment was granted.

Kingdomware timely appealed to this court. We have jurisdiction over the appeal under 28 U.S.C. § 1295(a)(3).

V

We review the Court of Federal Claims' grant of summary judgment without deference. *Dominion Res., Inc. v. United States*, 681 F.3d 1313, 1317 (Fed. Cir. 2012). In reviewing an agency's action in a bid protest case, we generally apply the Administrative Procedure Act's "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of a procedure required by law" standard of review. 5 U.S.C. § 706(2)(A), (D); *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001). Here, since there are no

factual or mixed factual and legal issues, and the only question is one of statutory construction, we apply the *Chevron* standard. *See Dominion*, 681 F.3d at 1317.

Chevron requires a reviewing court to determine by statutory construction, at the first step, "whether Congress has spoken to the precise question at issue." 467 U.S. at 842. If so, the "unambiguously expressed intent" of Congress prevails. *Id.* at 843. If, however, Congress has not spoken to the issue at hand, or has done so ambiguously, "the question for the court [at step two] is whether the agency's [interpretation] is based on a permissible construction of the statute." *Id.* If so, the agency's view of the law prevails. The interpretative exercise begins with the language of the statute, *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472 (1977), and uses "traditional tools of statutory construction," including the "statute's text, structure, and legislative history, and ... the relevant canons of interpretation." *Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9.

In the case before us, Congress did speak directly to the question of the Secretary's authority to use the Rule of Two "for purposes of meeting the goals under subsection (a)," stating that for such purposes the Secretary "shall" use the Rule of Two procedures. For the reasons explained below, we conclude that Kingdomware's interpretation of § 8127(d) does not account for, and undercuts, the Secretary's mandatory authority to set the goals for contracts to VOSBs, and therefore is not a reasonable interpretation. By directly tying the mandatory Rule of Two contracting procedure set forth

in subsection (d) to the achievement of the goals set pursuant to subsection (a), Congress's intent is clear. Congress intended the VA to meet the goals set by the Secretary. To meet the goals, the Secretary "shall" use Rule of Two procedures, "may" use the subsection (b) and (c) contract tools, and may elect to use the FSS at other times so long as the goals are met. We perceive no ambiguity in § 8127, which "is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843; *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

VI

Kingdomware argues that the mandatory language of § 8127(d)—"shall award"—requires the VA to conduct a Rule of Two analysis in all cases (other than those covered by subsections (b) and (c)), including those cases where the VA would prefer to order against the FSS. Kingdomware points out that Congress used language almost identical to that in § 8127 in the 2003 Veterans Act, but importantly, changed the permissive term "may" to the mandatory term "shall."[1] It invokes the canon of construction that a change in legislative language generally gives rise to a presumption that Congress intended to change the meaning of

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[1] The 2003 Veterans Act remains in effect and applies to all agencies. The 2006 Act, in contrast, applies only to the VA. The relevant provision of the 2003 Act states:

> In accordance with this section, a contracting officer *may award* contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the [Rule of Two is satisfied].

15 U.S.C. § 657f(b) (emphasis added).

the law. *See Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423, 1428 (Fed. Cir. 1997).

According to Kingdomware, the legislative history of the 2006 Act also supports its interpretation of § 8127(d). Kingdomware cites legislative history suggesting that the 2006 Act was passed following frustration with agencies' failure to meet the permissive VOSB contracting goals of the 1999 and 2003 Acts, and that Congress, in passing the 2006 Act to apply solely to the VA, "expect[ed] [the] VA to set the example among government agencies" for contracting with VOSBs. H.R. REP., at 15-16.

Kingdomware also points to legislative history wherein the bill's sponsor, John Boozman, explicitly noted the change in language from "may" to "shall" in § 8127(d), stating that "[t]he bill will essentially change what has been a 'may' to a 'shall' in terms of goals ...." *H.R. 1773, the Native American Veteran Home Loan Act; H.R. 3082, the Veteran-Owned Small Business Promotion Act of 2005; and Four Draft Bills: Hearing Before the Subcomm. on Econ. Opportunity of the H. Comm. on Veterans Affairs*, 109th Cong. 2 (2005) (statement of Rep. John Boozman, Member, H. Comm. on Veterans Affairs).

Finally, Kingdomware notes that in the Report accompanying the legislation, the Committee on Veterans' Affairs stated that "small businesses owned and controlled by veterans and service-disabled veterans should *routinely* be granted the *primary opportunity* to enter into VA procurement contracts." H.R. REP., at 14-15 (emphases added). According to Kingdomware, this is evidence that Congress intended the VA to determine whether the Rule of Two was satisfied for every contract before it could look to the FSS.

Kingdomware assigns no substantive meaning to the phrase "for purposes of meeting the goals under subsection (a)," and instead contends that the words only state the objective for Rule of Two awards, i.e., to meet the Secretary's goals. Kingdomware is adamant that the "for purposes" words have no limiting effect. But Kingdomware does not explain why Congress intended "shall" to continue as an imperative after the Secretary's goals are achieved, or why Congress intended for the goals to be set not by the Secretary, but by whatever success VOSBs have under the Rule of Two in the marketplace.

Looking first to the text of the statute, the VA notes that the mandatory language of subsection (d)—"shall award"—is preceded by the phrase "for purposes of meeting the goals under subsection (a)." While Kingdomware maintains that this phrase is merely hortatory, the VA argues that it must be given effect, and that, read as a whole, the provision mandates a Rule of Two analysis only for those contracts the VA has decided are necessary "for purposes of meeting the goals under subsection (a)."

Under § 8127(a), the VA is required to set VOSB contracting goals with a mandatory statutory floor. The VA points out that it retains significant discretion under this subsection to set the numerical value of these goals. According to the VA, this discretion would be meaningless, and the goal-setting provision of § 8127(a) would be rendered superfluous, if it were required to apply the Rule of Two for every contract. Under Kingdomware's interpretation of § 8127, the goal would be whatever number the Rule of Two produces, regardless of the Secretary's preference.

Responding to Kingdomware's argument that "shall" in the 2006 statute is necessarily entirely imperative because "may" limited the Rule of Two in the 2003 statute, the VA explains that "shall" in subsection (d) exists to distinguish "may" with regard to the noncompetitive set-aside procedures of subsections (b) and (c). In support, the VA cites the legislative history of the 2006 Act which explains clearly that Congress preferred use by the Secretary of the Rule of Two over the permissive noncompetitive procedures. H.R. REP., at 16. The VA thus reads subsection (d) in context with subsections (b) and (c) to give meaning to "shall" that does not preclude use of the FSS.

The VA also asserts that Kingdomware's reading of "shall" conflicts with its multiple small business contracting responsibilities. According to the VA, if it were to follow subsection (d)'s Rule of Two in every instance, in addition to respecting the contracting priorities of subsection (i), it would be unable to meet other small business contracting goals specified by the Small Business Act. Moreover, the VA points out that under the Small Business Act, including the 2003 Veterans Act amendments, agencies have always retained the discretion to use the FSS in lieu of following the Rule of Two. *See* 48 C.F.R. §§ 8.404(a), 19.502-1(b). It argues that a single wording change—from "may" in the 2003 Veterans Act to "shall" in the 2006 Act—without further explicit guidance as to how the provisions of the 2006 Act interact with the FSS is insufficient evidence that Congress intended to disrupt the existing scheme here. According to the VA, Kingdomware's interpretation would lead to the untenable result wherein the VA is unable to use the FSS for even routine and minor purchases.

Despite its consistent practice of retaining the discretion to forego the Rule of Two when using the FSS, the VA notes that since the passage of the 2006 Act it has consistently set and exceeded ambitious VOSB contracting goals. This is evidence, in the VA's view, that its interpretation is consistent with the aims of Congress in passing the 2006 Act, as expressed in the legislative history.

VII

It is a bedrock principle of statutory interpretation that each word in a statute should be given effect. *See Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995) ("An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage."); *see also Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1345 (Fed. Cir. 2010) (concluding that a party's proposed statutory interpretation "violat[ed] the rule of statutory construction that Congress does not use unnecessary words.").

Kingdomware's interpretation of subsection (d) assigns dispositive weight to the command term "shall," but ignores additional statutory language stating that this mandate is "for purposes of meeting the goals under subsection (a)." Under Kingdomware's interpretation, the statute's mandate requiring the VA to conduct a Rule of Two analysis would apply to every competitive contract contemplated by the VA without any regard for the VOSB contracting goals set under subsection (a), despite the provision's explicit reference to these goals. Indeed, Kingdomware conceded at oral argument that under its interpretation of 38 U.S.C. § 8127(d), the VA must continue to apply a Rule of Two analysis for every contract even *after* it has met the

goals set under § 8127(a). Oral Argument at 4:05-5:20. Further, as the VA points out, if § 8127(d) requires the agency to conduct a Rule of Two analysis for every contract irrespective of the goals set under subsection (a), this goal-setting provision is itself made superfluous. Because Kingdomware's plain meaning interpretation of § 8127(d) reads the words "for purposes of meeting the goals under subsection (a)" out of the statute and makes the mandatory goal-setting statutory provision unnecessary, it cannot stand.

The statutory scheme as a whole links the Rule of Two mandate (denoted by the word "shall") in subsection (d) to the goals set under subsection (a). The mandate is, therefore, the required procedure for meeting these goals. It is fully consistent with subsection (a), which requires the VA to set goals for contracting with VOSBs, but grants the VA considerable discretion to set the value of these goals. Accordingly, the agency need not perform a VOSB Rule of Two analysis for every contract, as long as the goals set under subsection (a) are met. The correct reading of the statute according to its plain meaning puts the "shall" in subsection (d) in harmonious context with the discretionary "may" provisions of subsections (b) and (c), and assures that the goals of subsection (a) will be set by the Secretary, not the success or failure of the Rule of Two in the marketplace.

Congress enacted § 8127 out of frustration with the failure of agencies Government-wide to achieve the aspirational goals of 3% for SDVOSBs. In hearings leading up to the 2006 Veterans Act, the prime reason for failure to achieve the Government-wide goals was "the discretionary, not mandatory, nature of the goals." H.R. REP., at 15. As Rep. Boozman observed, § 8127 changed what had been a "may" to a "shall" in terms of

goals. Congress chose the VA to set the example among Government agencies by imposing on it the obligation to meet the goals set by the Secretary for both categories of veteran-owned small businesses. *Id.* Indeed, Congress anticipated that with the contracting tools provided in § 8127, the VA would be able to "meet, if not exceed" its contracting goals, *id.*, while at the same time fulfilling the goals it has set for other small business entities. 152 Cong. Rec. S11609-03, S11616 ("The goals for veteran and service-disabled veteran owned businesses are not in any way intended to prevent attainment of other set-aside goals.").

As it stands, there is no reason to compel the Secretary to set aside any contract for a Rule of Two inquiry before using the FSS notwithstanding his goals, as Kingdomware requests. The VA has consistently met the mandatory goals for procurement from SDVOSBs and VOSBs in each year since the Veterans Act of 2006 went into force, and Kingdomware does not contend otherwise. The Secretary has complied with his statutory mandate to both set goals and meet them, and, accordingly, the VA contracting officer's decision not to set aside the contracts at issue was not arbitrary, capricious, or contrary to the law.

CONCLUSION

For the reasons provided above, we affirm the final decision of the Court of Federal Claims in favor of the VA.

AFFIRMED

COSTS

Each side shall bear its own costs.

REYNA, *Circuit Judge*, dissenting.

The majority holds that the 2006 Veterans Act does not require the Department of Veterans Affairs ("VA") to conduct a Rule of Two analysis in every procurement, as long as the VA satisfies its annual small business participation goals. I do not construe the 2006 Veterans Act as giving the VA discretion to decide whether to conduct a Rule of Two analysis. For this and other reasons set forth below, I respectfully *dissent*.

I.

The plain language of the 2006 Veterans Act unambiguously requires VA contracting officers to conduct a Rule of Two analysis in every acquisition and does not exempt task or delivery orders under the Federal Supply Schedule ("FSS") from this imperative. Despite the statute's clarity, the majority guts the Rule of Two imperative of its full force and effect by holding that a Rule of Two analysis is not required for every contract "as long as the goals set under subsection (a) are met." Maj. Op. at 19. Participatory goals, however, are aspirational, and an agency cannot refuse to set aside an acquisition solely because small businesses already receive a fair proportion of the agency's contracts.[1] In relying entirely on prefatory language to second-guess Congress, the majority becomes policy maker and departs from our duty to enforce the proper interpretation of the statute regardless of our policy views.[2]

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[1] 48 C.F.R. § ("FAR") 19.502-6(f); *see also LBM, Inc.*, B-290682, 2002 CPD ¶ 157 (Comp. Gen. Sept. 18, 2002).

[2] *See Harbison v. Bell*, 556 U.S. 180, 198 (2009) (Thomas, J., concurring) (noting that it "'is not within our province to second-guess' the 'wisdom of Congress' action' by picking and choosing our preferred interpretation from among a range of potentially

The statutory provision at issue could not be clearer. It provides that contracting officers "*shall* award contracts" on the basis of restricted competition whenever the contracting officer has a reasonable expectation that the Rule of Two will be satisfied:

> (d) **Use of restricted competition.**—Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department *shall award contracts* on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127(d) (emphasis added). This provision is part of a broader veteran-owned small business contracting program congressionally tailored to the VA, which requires the Secretary of the VA to increase small business contracting opportunities by establishing annual participation goals for veteran-owned small businesses ("VOSB") and service-disabled veteran-owned small businesses ("SDVOSB") in VA acquisitions. *Id.* § 8127(a)(1). This statutory program confirms the imperative character of subsection (d). Specifically, for contracts below the simplified acquisition threshold ($150,000), VA contracting officers "*may* use procedures other than competitive procedures" in awarding contracts to veteran-owned small businesses.

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plausible, but likely inaccurate, interpretations of a statute" (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003))).

Id. § 8127(b) (emphasis added). Similarly, for acquisitions valued above the simplified acquisition threshold but below $5 million, VA contracting officers "*may* award a contract" to a veteran-owned small business using noncompetitive procedures as long as certain requirements are met. *Id.* § 8127(c) (emphasis added).

In contrast, subsection (d) of the 2006 Veterans Act applies to all VA acquisitions and requires VA contracting officers to conduct a Rule of Two analysis in every acquisition, without limitation. Unlike subsections (b) and (c), which use discretionary language ("may use" and "may award"), subsection (d) uses mandatory language ("shall award"), and does not otherwise give discretion to VA contracting officers to decide whether to conduct a Rule of Two analysis. As the Supreme Court has noted, the word "shall" is ordinarily the language of command, and when the same statute uses both "may" and "shall," the normal inference is that each is used in its usual sense and that the former is permissive, the latter mandatory.[3]

Consistent with the 2006 Veterans Act's imperative, the Government Accountability Office ("GAO") has sustained more than seventeen protests in response to the VA's refusal to comply with § 8127(d).[4] As the GAO held, "The provisions of both the VA Act and the [VA Acquisition Regulation] are unequivocal; the VA 'shall' award contracts on the basis of competition restricted to SDVOSBs where there is a reasonable ex-

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[3] *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947); *see also Kentucky, Educ. Cabinet, Dep't for the Blind v. United States*, 424 F.3d 1222, 1227 (Fed. Cir. 2005).

[4] U.S. Gov't Accountability Office, B-158766, *GAO Report to Congress for Fiscal Year 2012* (Nov. 13, 2012).

pectation that two or more SDVOSBs will submit offers and award can be made at a fair and reasonable price." *Aldevra*, B-405271, 2011 CPD ¶ 183 (Comp. Gen. Oct. 11, 2011). The GAO further concluded that "the VA Act requires, without limitation, that the agency conduct its acquisitions using SDVOSB set asides where the necessary conditions are present." *Id.*

The majority summarily dismisses any reliance on the GAO's construction, noting that "the VA was on firm ground in refusing to accept the GAO decision." Maj. Op. at 10. Yet, we have long noted that GAO recommendations, although not binding, are nevertheless "instructive in the area of bid protests."[5] The Court of Federal Claims routinely "'give[s] due weight and deference' to GAO recommendations 'given the GAO's long experience and special expertise in such bid protest matters.'"[6] The majority ignores that GAO's experience and special expertise is such that "[a]n agency's decision to disregard a GAO recommendation is exceedingly rare." *Id.* Indeed, we recently acknowledged that "from 1997-2012, the GAO issued 5,703 merit decisions and sustained 1099 protests; during that period, an agency disregarded the GAO's recommendation only ten times." *Id.* at 1384-85. Hence, although not binding precedent, the GAO "plays an important role in the resolution of contested procurement decisions," and its construction of the 2006 Veterans Act is consistent with § 8127(d)'s "unequivocal" imperative to conduct a Rule of Two anal-

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[5] *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1038 n4 (Fed. Cir. 2009) (citing *Planning Research Corp. v. United States*, 971 F.2d 736, 740 (Fed. Cir. 1992)).

[6] *CMS Contract Mgmt. Servs. v. United States*, 745 F.3d 1379, 1384 (Fed. Cir. 2014) (quoting *Baird Corp. v. United States*, 1 Cl. Ct. 662, 668 (1983)) (alteration in original).

ysis in every procurement. *Honeywell, Inc. v. United States*, 870 F.2d 644, 647-48 (Fed. Cir. 1989).

II.

To override the clear imperative of § 8127(d), the majority relies on the provision's prefatory language to reason that requiring a Rule of Two analysis in every VA procurement "makes the mandatory goal-setting statutory provision unnecessary." Maj. Op. at 19. Prefatory language is introductory in nature and does nothing more than explain the general purpose for the Rule of Two mandate. The Supreme Court has noted, albeit in the context of constitutional construction, that "apart from [a] clarifying function, a prefatory clause does not limit or expand the scope of the operative clause" and that operative provisions should be given effect as operative provisions, and prologues as prologues. *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008). Here, the operative clause is that VA contracting officers must award contracts on the basis of restricted competition if they have a reasonable expectation that the Rule of Two will be satisfied, a mandate that cannot be limited by its prologue.

The majority takes an unusual step of collecting extrinsic evidence to show that "[t]he VA has consistently met the mandatory goals for procurement from SDVOSBs and VOSBs in each year since the Veterans Act of 2006 went into force[.]" Maj. Op. at 20. While the exact rationale for exploration outside the record is not clear, the majority apparently rests on these statistics to conclude that "there is no reason to compel the Secretary to set aside any contract for a Rule of Two inquiry" where the goals were met for the time period in question. *Id.* This is an improper construction of the statute, as it adds a limitation that does not exist in the

plain words of the statute. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004). Moreover, these statistics were not before the Court of Federal Claims or relied upon by either party, but were provided in response to a request during oral argument. As the appellant notes, the VA submission does not identify the source of the data and "appears to have been created specifically in response to the Court's request in this litigation." ECF#50, Appellant Letter to Court (Apr. 2, 2014). Significantly, there is no evidence in the record to show that VA contracting officers rely on, or have access to, these types of data in making contracting decisions, and the GAO has explicitly held that an agency's belief it has satisfied its small business goals does not affect its obligation to conduct a Rule of Two analysis.[7] In sum, the majority's use of this extrinsic evidence is post hoc rationalization constructed to shore-up an otherwise unsound construction of the statute.

III.

The majority's reliance on the phrase "for purposes of meeting the goals" is also belied by the VA's own regulations, which contain no such language. Specifically, in 2009, the VA issued regulations reiterating the imperative to conduct a Rule of Two analysis in every acquisition. *See* 48 C.F.R. §§ 819.7005, 817.7006. These regula-

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[7] *LBM, Inc.*, B-290682, 2002 CPD ¶ 157 (Comp. Gen. Sept. 18, 2002); *see also* FAR 19.502-6(f) (noting that agencies cannot refuse to set aside an acquisition solely on the basis that "[s]mall business concerns are already receiving a fair proportion of the agency's contracts for supplies and services").

tions, which use the mandatory phrase "shall set-aside," do not contain the phrase "for purposes of meeting the goals" or any other mention of the goals.[8] The VA's regulations thus unequivocally require the VA to conduct a Rule of Two analysis in every procurement, which is consistent with the agency's authority to write regulations as broadly as it wishes, subject only to the limits of the statute. *Auer v. Robbins*, 519 U.S. 452, 463 (1997). The majority downplays the regulation's imperative by pointing to the preamble to the regulations. Maj. Op. at 8 (quoting 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009)). Again, statements made in a preamble as part of the notice-and-comment process cannot override the unambiguous language of the regulations themselves. That is, where the enacting or operative parts of a statute or regulation are unambiguous, the meaning of the statute or regulation cannot be controlled or limited by the language in the preamble.[9] Accordingly, the VA's refusal

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[8] The VA Acquisition Regulation provides:

> (a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer *shall set-aside an acquisition* for competition restricted to SDVOSB concerns upon a reasonable expectation that,
>
> 1) Offers will be received from two or more eligible SDVOSB concerns; and
>
> 2) Award will be made at a fair and reasonable price.

48 C.F.R. § 819.7005 (emphasis added); *see also id.* § 819.7006 (applying same set-aside regulation to VOSBs). The exceptions mentioned at 48 C.F.R. §§ 813.106, 819.7007, and 819.7008 relate to sole-source awards and are thus not relevant to this appeal.

[9] *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) (quoting *Assoc. of Am. Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977)).

to conduct a Rule of Two analysis before proceeding to the FSS is at minimum a violation of its own regulations, if not also a violation of § 8127(d).

IV.

The majority does not address the practical implications of its decision in light of the VA's *existing* obligation under the Federal Acquisition Regulation ("FAR") to conduct a Rule of Two analysis in nearly every acquisition exceeding $3,000. FAR 19.502-2.[10] By holding that the 2006 Veterans Act's Rule of Two provision is discretionary, the majority effectively renders § 8127(d) superfluous and unnecessary in light of the FAR's existing Rule of Two requirement. Although the FAR exempts task or delivery orders awarded under FSS contracts from the general Rule of Two requirement, *see* FAR 19.502-1(b), the 2006 Veterans Act is devoid of any similar language that would allow the VA to proceed directly to the FSS without first conducting a Rule of Two analysis. Hence, the majority's holding reads this exemption into § 8127(d) and expands the VA's discretion to decide when to conduct a Rule of Two analysis, thereby undermining the statutory role of § 8127(d).

The majority, on the other hand, finds mischief in requiring contracting officers to continue conducting

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[10] The FAR contemplates two situations in which the contracting officer must conduct a Rule of Two analysis. For acquisitions exceeding $3,000 but less than $150,000, the contracting officer must award the contract on the basis of restricted competition unless he or she makes an affirmative finding that the Rule of Two is not reasonably expected to be satisfied. *Id.* § 19.502-2(a). For acquisitions exceeding $150,000, "[t]he contracting officer *shall set aside*" the acquisition for small businesses "when there is a reasonable expectation that" the Rule of Two will be met. *Id.* § 19.502-2(b) (emphasis added).

Rule of Two analyses after the agency's goals are met. The majority concludes that requiring a Rule of Two analysis in every VA procurement would render the goal-setting provision superfluous, as "the goal would be whatever number the Rule of Two produces, regardless of the Secretary's preference." Maj Op. at 17. The majority seemingly believes it is bad policy to require an agency to continue efforts to award contracts to small businesses once its participation goals are met, overlooking that participation goals are aspirations, not destinations. Indeed, the FAR explicitly provides that an agency may not refuse to set aside an acquisition solely on the basis that small businesses are "already receiving a fair proportion of the agency's contracts for supplies and services." FAR 19.502-6(f).

The mischief feared by the majority is further refuted by the discretion retained by contracting officers in how they perform a Rule of Two analysis. Because the Rule of Two requires contracting officers to set aside an acquisition *only* if they have a reasonable expectation that (i) offers will be made by at least two responsible small businesses, and (ii) award will be made at fair market prices, contracting officers are entitled to exercise their business judgment in determining whether these two conditions are met. *See* 38 U.S.C. § 8127(d); FAR 19.502-2. The contracting officer's decision not to set aside a procurement is subject to a "highly deferential rational basis review" and will not be overturned absent a showing that his or her business judgment was unreasonable.[11] The contracting

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[11] *Res-Care, Inc. v. United States*, 735 F.3d 1384, 1390 (Fed. Cir. 2013); *see also Information Ventures, Inc.*, B-294267, 2004 CPD ¶ 205 (Comp. Gen. Oct. 8, 2004); *Benchmade Knife Co., Inc. v. United States*, 79 Fed. Cl. 731, 738 (2007).

officer is not required to use any particular method of assessing small business availability, and factors such as "prior procurement history, market surveys and/or advice from the agency's small business specialist and technical personnel may all constitute adequate grounds for a contracting officer's decision not to set aside a procurement." *Raven Servs. Corp.*, B-243911, 91-2 CPD ¶ 203 (Comp. Gen. Aug. 27, 1991). The Rule of Two, therefore, does not diminish the contracting officer's discretion to ultimately conclude that there is (or is not) a reasonable basis for setting aside any given procurement for small businesses.

The majority's reticence to requiring agency advancement of small business participation beyond the aspirational goals is due to a misapprehension of the interplay between a Rule of Two analysis and agency-wide goals. The former is undertaken by the contracting officer on a contract-by-contract basis, while the latter are set by the head of the agency and inform the agency's entire procurement process. Under the majority's rationale, the participation goals established under the Small Business Act would also be rendered superfluous by the FAR's existing Rule of Two requirement, which applies in nearly every acquisition. *See* 15 U.S.C. § 644(g)(1); FAR 19.502-1. Such an outcome would overturn more than thirty years of federal procurement law upholding the Rule of Two as a legitimate method of ensuring that agencies award a "fair proportion" of contract dollars to small businesses.[12] In

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[12] *See, e.g., Adams & Associates, Inc. v. United States*, 741 F.3d 102, 110 (Fed. Cir. 2014) (rejecting the argument that a "'fair proportion' determination must be made on a contract-specific basis"); *Delex Sys., Inc.*, B-400403, 2008 CPD ¶ 181 (Comp. Gen. Oct. 8, 2008) (noting that "[t]he origin of the Rule of Two predates the FAR" and that "it has been adopted as the FAR's implementation

fact, the FAR requires agencies to conduct a Rule of Two analysis under FAR 19.502-2 regardless of whether the agency's "small business goals have already been satisfied." *LBM, Inc.*, B-290682, 2002 CPD ¶ 157 (Comp. Gen. Sept. 18, 2002).

The real mischief here is that the majority opinion would saddle contracting officers with the obligation in every acquisition to determine the status of the agency's small business goals—expressed as percentages of total awarded contract dollars—but does not elaborate on how contracting officers can determine that these goals have been "met" before the end of the fiscal year. Participation goals require agency officials to consider a range of factors in their broader acquisition policies well before a solicitation is issued or an individual contract is contemplated. The majority thus errs when it asserts that an obligatory Rule of Two requirement would obviate the goal-setting provision of the 2006 Veterans Act.

V.

In sum, the majority adopts an untenable construction of the 2006 Veterans Act by holding that the agency need not perform a VOSB Rule of Two analysis for every contract, as long as the goals set under subsection (a) are met. The majority's holding deprives the Rule of Two mandate of its force and effect, it impedes congressional objectives regarding set asides, and it renders § 8127(d) inoperative and unnecessary. For these reasons, I *dissent*.

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of the [Small Business] Act's requirements"); *Federal Acquisition Regulation (FAR) "Rule of Two"*, 49 Fed. Reg. 40,135, 40,136 (Oct. 12, 1984) ("This method of implementing the fair proportion of total contracts has been upheld by the Courts and the Comptroller General.").

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 12-173C

KINGDOMWARE TECHNOLOGIES, INC.,
Plaintiff,

v.

UNITED STATES,
Defendant.

November 27, 2012

[107 Fed. Cl. 226]

Bid Protest; Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127–28 (2006 & West Supp. 2012); Veteran-Owned Small Business Set-Asides; *Chevron* Statutory Interpretation

* * *

OPINION

FIRESTONE, *Judge.*

Plaintiff Kingdomware Technologies, Inc. ("plaintiff"), a service-disabled veteran-owned small business, brings this bid protest claim seeking injunctive relief compelling the Department of Veterans Affairs ("VA") to comply with the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-

28 (2006 & West Supp. 2012) ("the 2006 Act" or the "Act"). Plaintiff filed an amended complaint on July 18, 2012, alleging that VA conducted three procurements in violation of the 2006 Act by failing to set aside those procurements for veteran-owned small businesses ("VOSBs") or service-disabled veteran-owned small businesses ("SDVOSBs"), such as plaintiff. For the purposes of the pending cross-motions for judgment on the administrative record, the parties have stipulated to the facts in regard to one of the three procurements at issue. The parties' cross-motions focus only on the legal question of whether VA failed to comply with the 2006 Act in conducting this procurement.[1] For the reasons that follow, the court **GRANTS** the government's motion for judgment on the stipulated facts, and **DENIES** plaintiff's motion.

I. STATUTORY AND REGULATORY FRAMEWORK

This case turns on a question of statutory interpretation: whether, under the 2006 Act, VA must first determine if it can conduct its acquisitions using restricted competition among SDVOSBs or VOSBs before deciding to use another procurement method, the Federal Supply Schedule ("FSS"), to meet its requirements. In particular, the court must determine whether Congress intended that VA retain its discretion to procure goods

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[1] In its cross-motion for judgment on the stipulated facts, the government also argued that Kingdomware was not verified by VA as an eligible SDVOSB or VOSB as required by the 2006 Act, and was therefore ineligible for award under the Act. Def.'s Cross-Mot. at 2. This database error has since been corrected, and plaintiff is now listed as a certified SDVOSB. *See* Pl.'s Resp., Ex. 5. The government no longer disputes that plaintiff is a certified SDVOSB under the 2006 Act. Def.'s Reply at 14 n.2.

and services from the FSS, in light of the set-aside procedures set forth in the 2006 Act. If Congress is silent as to this issue, the court must determine whether VA's interpretation, that it does not to need consider restricted competition among SDVOSBs and VOSBs before procuring from the FSS, is reasonable with regards to the statutory language, purpose, and legislative history of the 2006 Act. The answer to this question depends on the terms and structure of the Act itself, and on Congress' understanding of the relationship between the Act and the procurement methods available to VA under the Federal Acquisition Regulations. In several decisions, the Government Accountability Office ("GAO") has taken the position that the legislation and its regulations mandate that VA must determine whether it can set aside each of its procurements for restricted competition among SDVOSBs and VOSBs before using the FSS. VA has elected not to follow the GAO decisions, including in the present case.[2]

This particular question of statutory interpretation is a case of first impression before this court. To better understand the dispute over the proper interpretation of the 2006 Act, the court sets forth below the statutory and regulatory framework relevant to the FSS procurement at issue together with the GAO precedent and VA's response.

A. The Federal Supply Schedule.

Federal agencies traditionally procure supplies using full and open competition to ensure that the public receives the best value possible, using procedures out-

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[2] GAO decisions are not binding authority, but may be "instructive in the area of bid protests." *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1038 n.4 (Fed. Cir. 2009).

lined in the Federal Acquisition Regulations ("FAR"). *See* 48 C.F.R. ("FAR") § 14.000 *et seq.* (sealed bidding procedures); FAR § 15.000 *et seq.* (negotiated acquisition procedures). Individual agencies, including VA, are permitted to deviate from the general FAR. *See* FAR § 814.104 *et seq.* (containing sealed bidding procedures unique to VA); FAR § 815.303 (containing negotiated acquisition procedures unique to VA); FAR § 819.7001 *et seq.* (implementing in part the 2006 Act at issue here). VA's unique acquisition regulations are referred to as the Veterans Affairs Acquisition Regulations ("VAAR").

When procuring supplies or services, an agency may be required to use certain sources or set aside procurements for certain types of contractors. *See* FAR § 8.002 (listing the order of priority when ordering supplies and services). FAR Part 19 includes provisions relating to contract set-asides for small businesses generally and for certain types of small businesses, such as women-owned small businesses or economically-disadvantaged small businesses. *See* FAR § 19.000(a)(3). These set-aside provisions also include set-asides for SDVOSBs,[3] such as plaintiff, pursuant to the Veterans Benefit Act of 2003, 15 U.S.C. § 657f (2006).[4] FAR Part 19 mandates that small business set-

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[3] FAR Part 19 also recognizes VOSBs, *see* FAR § 19.201(a) ("It is the policy of the Government to provide maximum practicable opportunities in its acquisitions to small business, *veteran-owned small business*, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns.") (emphasis added), although no separate VOSB program like the set-aside program for SDVOSBs is found in FAR Part 19.

[4] The Veterans Benefit Act of 2003 states, in part:

asides be used within or over certain contracting thresholds when the contracting officer reasonably expects to receive offers from two or more responsible businesses and the award will be competitive or awarded at fair market price. FAR § 19.502-2(a), (b). In addition, contracting officers conducting acquisitions over certain contracting thresholds must preference several specialized small business set-aside programs, including that for SDVOSBs, before using a general small business set-aside. FAR § 19.203(c). Small business set-asides have priority over acquisitions using full and open competition. FAR § 19.203(e).

Although the traditional acquisition and set-aside procedures described above are appropriate for many acquisitions, it is often inefficient to use these methods for smaller acquisitions. To provide federal agencies with a "simplified process for obtaining commercial supplies and services at prices associated with volume buying," the General Services Administration ("GSA") has established the Federal Supply Schedule ("FSS"). FAR § 8.402(a). Contractors agree to provide supplies and services at stated prices for given periods of time on the FSS, permitting federal agencies to buy supplies directly from the FSS, rather than holding a publicly-advertised full and open competition for every individual requirement. *Id.* Orders placed against the FSS

In accordance with this section, a contracting officer may award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price.

15 U.S.C. § 657f(b).

are deemed to satisfy the conditions of full and open competition and are not subject to the requirements of traditional procurement procedures, including the set-aside requirements established in FAR Part 19. FAR § 8.404(a).

Agency discretion to use the FSS is usually unrestricted. Absent a statutory or regulatory requirement to the contrary, an agency generally retains unfettered discretion to select the procurement method it wishes to use and in particular, whether it wishes to meet its acquisition requirements using the FSS. *K-Lak Corp. v. United States*, 98 Fed. Cl. 1, 8 (2011) (quoting *Tyler Constr. Grp. v. United States*, 570 F.3d 1329, 1334 (Fed. Cir. 2009)) ("Federal procurement entities have 'broad discretion to determine what particular method of procurement will be in the best interests of the United States in a particular situation.'"). Importantly for this case, it is well-settled that when placing an order against the FSS, the agency is exempt from the small business set-aside programs under FAR Part 19. FAR §§ 8.404(a), 8.405-5(a), 19.502-1(b); *see K-Lak*, 98 Fed. Cl. at 2 n.3 ("[T]he Small Business Program rules in FAR Part 19 do not apply to orders placed against and fully within the scope of existing FSS contracts.").

The FSS has therefore been historically utilized as a procurement method separate and apart from traditional procurement methods and set-aside provisions found elsewhere in the FAR. The parties' dispute in this case centers on whether the language of the 2006 Act alters the traditional relationship between the FSS and small business set-asides by mandating that VA first determine whether it can set aside all of its procurement activities for restricted competition among SDVOSBs and VOSBs before deciding to meet its re-

quirements through the FSS. The court now turns to the 2006 Act and its implementing regulations.

B. The 2006 Act and its regulations.

1. The 2006 Act.

Congress enacted the Veterans Benefits, Health Care, and Information Technology Act as Sections 502 and 503 of Public Law 109-461 in 2006.[5] The 2006 Act applies only to supplies and services procured by VA. *See* 48 C.F.R. § 819.7002 ("This subpart [implementing the 2006 Act] applies to VA contracting activities and to its prime contractors."); *Angelica Textile Servs., Inc. v. United States*, 95 Fed. Cl. 208, 222 (2010). The 2006 Act requires VA to set goals for SDVOSB and VOSB participation in VA contracts, and provides for several contracting tools, including set-asides and noncompetitive procurement procedures, to achieve the goal of increasing SDVOSB and VOSB participation. Plaintiff's protest centers on whether, under § 8127(d) of the 2006 Act, VA is required to conduct market research to determine if VA procurements should be set aside for SDVOSBs or VOSBs before VA acquires supplies and services using the FSS. Section 8127 of the 2006 Act reads, in relevant part:

> **(a) Contracting goals.**—(1)In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities, the Secretary shall—

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[5] The 2006 Act was amended in 2008, 2010, 2011 and 2012, but those amendments do not affect the portions of the Act relevant in this case.

(A) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans who are not veterans with service-connected disabilities in accordance with paragraph (2); and

(B) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans with service-connected disabilities in accordance with paragraph (3).

(2) The goal for a fiscal year for participation under paragraph (1) (A) shall be determined by the Secretary.

(3) The goal for a fiscal year for participation under paragraph (1) (B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)).

...

(b) Use of noncompetitive procedures for certain small contracts.—For purposes of meeting the goals under subsection (a), and in accordance with this section, in entering into a contract with a small business concern owned and controlled by veterans for an amount less than the simplified acquisition threshold (as defined in section 134 of title 41 [currently, $100,000), a contracting officer of the Depart-

ment may use procedures other than competitive procedures.

(c) **Sole source contracts for contracts above simplified acquisition threshold.**—For purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department may award a contract to a small business concern owned and controlled by veterans using procedures other than competitive procedures if—

(1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;

(2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 134 of title 41 [currently $100,000]) but will not exceed $5,000,000; and

(3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

(d) **Use of restricted competition.**—Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award

> can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127. The language in § 8127(d) stating that a contracting officer must have "a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price" is often referred to as the "Rule of Two." *See Distrib. Solutions, Inc. v. United States*, 104 Fed. Cl. 368, 390 (2012). The "Rule of Two" is common among small business set-aside procedures. *See, e.g.*, FAR § 19.502-2(b); *Distrib. Solutions*, 104 Fed. Cl. at 390. A contracting officer conducts market research, such as by searching through a database of small businesses, to determine whether the "Rule of Two" is satisfied. *See* 48 C.F.R § 810.001 (a VAAR instructing a VA contracting team to conduct market research using the database for SDVOSBs and VOSBs).

Section 8127(i) of the 2006 Act also prioritizes SDVOSBs and VOSBs for VA contracts over other small business contracting preferences, such as those outlined in FAR Part 19, that VA may use:

> **(i) Priority for contracting preferences.**—Preferences for awarding contracts to small business concerns shall be applied in the following order of priority:
>
> (1) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and controlled by veterans with service-connected disabilities.
>
> (2) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned

and controlled by veterans that are not covered by paragraph (1).

(3) Contracts awarded pursuant to—

(A) section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(B) section 31 of such Act (15 U.S.C. 657a).

(4) Contracts awarded pursuant to any other small business contracting preference.

Id. § 8127(i).

Finally, § 8128 of the 2006 Act, also addressing contracting preferences, states, in part:

(a) **Contracting priority.**—In procuring goods and services pursuant to a contracting preference under this title or any other provision of law, the Secretary shall give priority to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference.

Id. § 8128(a).

2. Regulations implementing the 2006 Act.

The VAAR implementing the 2006 Act can be principally found at 48 C.F.R. ("VAAR") Part 819. The regulations acknowledge the goal-setting provision of the Act in VAAR § 819.201: "The Secretary shall establish goals for each fiscal year for participation in Department contracts by SDVOSBs and VOSBs." The VAAR further state that "Sections 502 and 503 of the Veterans Benefits, Health Care, and Information Technology Act of 2006 (38 U.S.C. 8127-8128), created an acquisition program for small business concerns owned and controlled by service-disabled veterans and

those owned and controlled by veterans for VA." VAAR § 819.7001(a). The VAAR explain that the "purpose of the program is to provide contracting assistance to SDVOSBs and VOSBs." *Id.* § 819.7001(b).

VAAR Subpart 819.70 implements the portions of the Act at issue here. First, the regulations state that the 2006 Act applies to "VA contracting activities and to its prime contractors," and outline the eligibility requirements for SDVOSBs and VOSBs. VAAR §§ 819.7002-03. Next, VAAR § 819.7004 echoes the list of priorities found in § 8127(i) of the 2006 Act:

> In determining the acquisition strategy applicable to an acquisition, the contracting officer shall consider, in the following order of priority, contracting preferences that ensure contracts will be awarded:
>
> (a) To SDVOSBs;
>
> (b) To VOSB, including but not limited to SDVOSBs;
>
> (c) Pursuant to—
>
> (1) Section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or
>
> (2) The Historically-Underutilized Business Zone (HUBZone) Program (15 U.S.C. 657a); and
>
> (d) Pursuant to any other small business contracting preference.

VAAR § 819.7005 then implements the terms of the 2006 Act in regard to SDVOSBs, and in particular the "Rule of Two," stating, in relevant part:

> (a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106 [involving contracts exceeding the micro-purchase threshold up to $5 million], 819.7007 [involving awards to SDVOSBs of under $5 million on a sole source basis] and 819.7008 [involving awards to VOSBs of under $5 million on a sole source basis], the contracting officer shall set-aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that,
>
> (1) Offers will be received from two or more eligible SDVOSB concerns; and
>
> (2) Award will be made at a fair and reasonable price.

VAAR § 819.7006 contains an identical provision for VOSBs. The remainder of VAAR Subpart 819.70 deals with sole source awards to SDVOSBs and VOSBs, and the contract clauses that a contracting officer must include in solicitations and contracts for acquisitions under Subpart 819.70. VAAR §§ 819.7007-09. Several other scattered portions of the VAAR implement other parts of the 2006 Act. *See, e.g.*, VAAR § 802.101 (laying out definitions applicable to the VAAR implementing the Act). The VAAR themselves do not expressly address the relationship between the 2006 Act and the FSS. Rather, as discussed *infra*, VA has taken the position in the preamble to the VAAR that the 2006 Act does not apply when VA elects to use the FSS to meets its acquisition needs.

C. The GAO's *Aldevra* decision and VA's response.

On October 11, 2011, the GAO sustained a protest by Aldevra LLC, a SDVOSB challenging VA's use of the FSS before considering SDVOSB and VOSB set-asides in acquiring one skillet, one food slicer, and three griddles for two VA medical centers. *Aldevra*, B-405271 *et al.*, 2011 WL 4826148, at * 1 (Comp. Gen. Oct. 11, 2011). VA conceded that there were at least two SDVOSBs capable of meeting the requirements under the challenged solicitations. *Id.* at *2. Aldevra argued that based on the terms of the 2006 Act and the VAAR, VA had to conduct market research to consider SDVOSBs and VOSBs before acquiring these items from the FSS. *Id.* at * 1. VA argued in response that it retained its discretion under the Act to determine whether to use the FSS as opposed to SDVOSB or VOSB set-asides. *Id.* at *2. VA in particular relied on the preamble to the final VAAR implementing the Act, in which VA rejected a proposed revision to the VAAR that would have expressly stated that the set-asides and sole source provisions do not apply at the FSS order level. *Id.* at *3. In rejecting that revision to its rule, VA explained that the rule does not apply to the FSS and stated in its rulemaking proceedings that:

> We disagree with the commenter and reject the suggestion because this rule does not apply to FSS task or delivery orders. VA does not believe a change to the regulation is needed, and 48 CFR part 8 procedures in the FAR will continue to apply to VA FSS task/delivery orders. Further, VA will continue to follow GSA guidance regarding applicability of 48 CFR part 19 of the FAR, Small Business Programs,

> which states that set-asides do not apply to FAR part 8 FSS acquisitions.

Id. at *3; VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009) (emphasis added).

In interpreting the 2006 Act and its regulations, the GAO rejected VA's interpretation of the 2006 Act and VA's implementing regulation preamble. The GAO found that VA, before electing to use the FSS, must conduct market research to determine whether two or more SDVOSBs or VOSBs are capable of performing the requirements of the challenged solicitations, and, if so, that VA must set aside the solicitations for limited competition. *Aldevra*, 2011 WL 4826148, at *3. The GAO found "nothing in the [2006] Act or the VAAR that provides the agency with discretion to conduct a procurement under FSS procedures without first determining whether the acquisition should be set aside for SDVOSBs." *Id.* at *2. Instead, based on the use of "shall" in both § 8127(d) of the 2006 Act and the implementing VAAR, the GAO found that "the [2006] Act and the VAAR are unequivocal; the VA shall award contracts on the basis of competition restricted to SDVOSBs" where the conditions under the statute and regulations are met. *Id.* The GAO also found that FAR Part 8's provision that FSS procurements are exempt from FAR Part 19 set-asides only pertains to SDVOSB set-asides under the Veterans Benefit Act of 2003—which applies government-wide—and not to the 2006 Act, which relates only to VA procurements. *Id.* at *3-4. In distinguishing the two acts, the GAO further found that, in contrast to the 2006 Act, the language in the Veterans Benefit Act of 2003 used the permissive "may" rather than "shall" in directing a contracting of-

ficer to award contracts based on the "Rule of Two" for SDVOSBs. *Id.* at *4, *see supra* note 4. For these reasons, the GAO recommended in *Aldevra* that VA cancel and re-solicit the challenged solicitations using an SDVOSB set-aside. *Id.*

Following the *Aldevra* ruling, VA issued a memo to all VA acquisition and procurement officials stating that the GAO's recommendation and its interpretation of the 2006 Act should not be followed.[6] VA instructed its acquisition officials to continue using the FSS in line with VA's interpretation of the 2006 Act as inapplicable to FSS procurements. The GAO has since followed the rationale of *Aldevra* in several other protests, including plaintiff's protest before the GAO regarding the procurement at issue in this case, and VA has consistently declined to follow GAO's recommendation. *See, e.g.*, *Kingdomware Techs.*, B-406507, 2012 WL 1942256, at *1 (Comp. Gen. May 30, 2012).

The GAO has not, however, consistently rejected VA's decision to use the FSS without first applying the "Rule of Two" analysis. In another recent protest, the GAO held that VA may use the FSS first if it undertakes the "Rule of Two" analysis in selecting among FSS vendors. *Crosstown Courier Serv., Inc.*, B-406336, 2012 WL 1405913, at * 1 (Comp. Gen. Apr. 23, 2012). In particular, the GAO held that nothing in § 8127(d) "requires VA to conduct its market research exclusively on the open market, as opposed to among FSS vendors.... Thus, the agency's initial decision to conduct market research confined to FSS vendors was not, in

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[6] Under the Competition in Contracting Act, 31 U.S.C. § 3554(b), GAO decisions are only recommendations and not binding on VA. *Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 186, 196 n.21 (2011).

and of itself, objectionable, to the extent that the VA sought to determine whether there were two or more SDVOSB (or VOSB) FSS vendors capable of meeting its requirement." *Id.* at *2. Based on these decisions, uncertainty remains as to when and how VA must apply the set-aside procedures outlined in the 2006 Act.[7]

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[7] To further complicate the issue, the GAO also found in *Alternative Contracting Enterprises, LLC*, B-406265 *et al.*, 2012 WL 989288 (Comp. Gen. Mar. 26, 2012), that because the 2006 Act is silent as to the effect of its set-aside provisions on "AbilityOne" contracting set-asides—a separate, mandatory contracting preference for nonprofits for the blind or severely disabled—VA reasonably interpreted that "AbilityOne" contractors maintained their priority over SDVOSBs and VOSBs notwithstanding the terms of the 2006 Act. The GAO deferred to VA's interpretation of its regulations in the preamble of the regulations implementing the 2006 Act and to VA's internal guidelines. *Id.* This court has similarly deferred to VA's interpretation of these statutory preferences in light of the Act's silence. *Angelica Textile*, 95 Fed. Cl. at 222.

In denying a request for reconsideration of the *Alternative Contracting* decision, the GAO distinguished its decision in *Aldevra*, stating that the *Alternative Contracting* case involved VA's reasonable interpretation of two unambiguous but conflicting statutory mandates, while *Aldevra* involved "the interpretation of the VA Act without reference to other statutory preferences," and that under *Aldevra*, "the VA's elevation of FSS acquisitions over SDVOSB and VOSB set-asides" was inconsistent with the plain meaning of the 2006 Act. *Pierce First Med.*, B-406291.3 *et al.*, 2012 WL 2150219, at *3-4 (Comp. Gen. June 13, 2012). The VA also went on to disagree with the protesters' argument that "the VA Act preference operates without regard to any other provision of law." *Id.* at *4. Rather, the GAO found that, at least with regard to small business set aside priorities, the VA Act "anticipates the operation of other statutory preferences." *Id.*

II. STIPULATED FACTS AND PROCEDURAL HISTORY

The following facts have been stipulated to by the parties. In January 2012, VA determined that it needed to procure an Emergency Notification Service ("ENS") for the Veterans Integrated Service Network 5, a grouping of four VA medical centers and associated outpatient clinics. The purpose of an ENS is to rapidly deliver messages to VA personnel with critical information and notices in an emergency situation, such as a natural disaster. The proposed contract was intended to provide ENS services only until a VA-wide notification system is implemented, which is anticipated to occur during fiscal year 2012.

VA's contracting officer decided to satisfy VA's requirements under FAR Subpart 8.4 using the FSS. The VA contracting officer conducted market research under FAR Subpart 8.4 and identified three possible sources for the ENS on the FSS. However, the contracting officer determined that none of the three sources could meet VA's requirements, and a limited source FSS justification was conducted in accordance with FAR § 8.405-6.

On or about February 14, 2012, the contracting officer sent Request for Quote VA245-12-Q-0078 ("RFQ") to FSS vendor Everbridge, Inc. ("Everbridge") to solicit a quote for ENS services. The RFQ included one base year and two option years. Everbridge submitted a quote of $33,824.10 for the base year of March 1, 2012 through February 28, 2013; $33,824.10 for option year one, if exercised, and $33,824.10 for option year two, if exercised. On February 22, 2012, after having determined that Everbridge offered a fair and reasonable price, the contracting officer awarded a task order con-

tract to Everbridge pursuant to its FSS blanket purchase agreement for the base year at $33,824.10 and a total amount of $101,472.30 if both options years were exercised.

The contracting officer posted the contract award to the Federal Procurement Data System-Next Generation reporting system. Thereafter, on March 14, 2012, plaintiff filed a bid protest with the GAO objecting to the award on the basis that VA allegedly had not complied with the 2006 Act because it had not set aside the contract for limited competition among SDVOSBs before using the FSS. *Kingdomware Techs.*, B-406507, 2012 WL 1942256, at *1 (Comp. Gen. May 30, 2012). On May 30, 2012, the GAO issued a decision sustaining the protest for the reasons discussed in the *Aldevra* opinion.[8] *Id.* On August 8, 2012, VA responded to the GAO and Kingdomware that VA would decline to follow the GAO's recommendations in its decision.

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[8] This opinion also states that VA "conducted market research in connection with this procurement and found that there were at least 20 SDVOSBs that could perform the requirements at issue." *Kingdomware Techs.*, 2012 WL 1942256, at *1. Plaintiff asserts that this demonstrates that VA knew SDVOSBs were capable of performing the contract at issue. The government in response contends that the research was conducted in 2008 for the original ENS procurement, not the procurement currently being protested. Def.'s Cross-Mot. at 9 n.4. The government further argues that even if SDVOSBs were on the FSS for this type of contract, this does not mean they were qualified to perform the stipulated contract. *Id.* For the purposes of these cross-motions, the court will disregard this dispute. Even if VA did perform market research that revealed two or more SDVOSBs capable of performing the services, the fact remains that VA chose to order against the FSS for the services at issue here, and the only question before the court is whether ordering against the FSS before setting aside the contract for SDVOSB restricted competition was permissible under the terms of the 2006 Act.

On March 15, 2012, plaintiff filed its initial complaint in this court. On July 18, 2012, plaintiff filed an amended complaint alleging that VA conducted three procurements in violation of the 2006 Act by failing to set aside those procurements for VOSBs and SDVOSBs, including plaintiff. At a status conference held on August 21, 2012, the parties agreed to select one of the three claims for which they would not dispute the underlying administrative record, and submit cross-motions for judgment on the stipulated facts that focused on the sole legal question of whether the 2006 Act mandates that VA conduct procurements in accordance with § 8127(d) of the Act before ordering against the FSS.

In its cross-motion, plaintiff argues that the GAO is correct in finding that the 2006 Act mandates that VA first determine whether SDVOSB or VOSB set-asides should be used before VA can order against the FSS. The government argues in response that the 2006 Act is only a goal-setting statute and simply provides VA with tools to meet the SDVOSB and VOSB contracting goals set by the Act. The government contends that nothing in the 2006 Act restricts VA's discretion to order against the FSS.

For the reasons discussed below, the court disagrees with plaintiff and the GAO, and finds that VA need not comply with the "Rule of Two" under § 8127(d) of the Act before using the FSS to meet its procurement needs.

III. STANDARD OF REVIEW

The applicable standard of review in a bid protest is provided by the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A) and is highly deferential. *Advanced Data Concepts, Inc. v. United States*, 216

F.3d 1054, 1058 (Fed. Cir. 2000). The court's review is limited to determining whether an agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Al Andalus Gen. Contracts Co. v. United States*, 86 Fed. Cl. 252, 262 (2009) (quoting *Banknote Corp. of Am. v. United States*, 365 F.3d 1345, 1350-51 (Fed. Cir. 2004)). Under this standard, the plaintiff bears a "heavy burden." *E.W. Bliss Co. v. United States*, 77 F.3d 445, 449 (Fed. Cir. 1996). "[A] bid award may be set aside if either (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001). Plaintiff's bid protest is based upon an alleged violation of law. When challenging a procurement on this ground, "the disappointed bidder must show a clear and prejudicial violation of applicable statutes or regulations." *Id.* at 1333 (internal quotations omitted).

IV. DISCUSSION

A. The *Chevron* framework.

The parties agree that this case only involves a question of statutory interpretation: whether the terms of the 2006 Act mandate that VA set aside every acquisition for SDVOSBs or VOSBs if two or more SDVOSBs or VOSBs can provide a fair and reasonable price for the contract before meeting its requirements using the FSS. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), provides the framework for deciding the statutory interpretation question presented in this case. Under *Chevron*, this court first must determine "whether Congress has directly spoken to the precise question at issue. If

the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842. To determine the intent of Congress, the court looks to the language of the statute itself. *Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000). Beyond the statute's text, tools of statutory construction may be used, including the statute's structure, canons of statutory construction, and legislative history. *Id.*; *see also Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9.

However, "if the statute is silent or ambiguous with respect to the specific issue," a court must proceed to the second step of *Chevron*, which is to ask whether the implementing agency's interpretation of the statute is reasonable. *Id.* at 843; *see also Ad Hoc Shrimp Trade Action Comm. v. United States*, 596 F.3d 1365, 1369 (Fed. Cir. 2010). The court must not "impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron*, 467 U.S. at 843 (footnote omitted). Rather, "*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomm'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citation omitted).

In determining whether an agency's interpretation of a statute is reasonable, an agency's construction is entitled to deference if it is not in conflict with the plain language of the statute or the congressional intent or

purpose of the statute. *See Nat'l R.R. Passenger Corp. v. Boston and Me. Corp.*, 503 U.S. 407, 417 (1992) ("If the agency interpretation is not in conflict with the plain language of the statute, deference is due."); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233 (1986); *Chem. Mfrs. Ass'n v. NRDC, Inc.*, 470 U.S. 116, 126 (1985) ("We should defer to [the agency's] view unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent on the part of Congress."). In addition, an agency's interpretation of a particular statutory provision qualifies for *Chevron* deference when that interpretation is reached through formal proceedings, such as by an agency's power to engage in notice-and-comment rulemaking. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1360 (Fed. Cir. 2007).

Even where an agency's interpretation of a statute was not promulgated in the exercise of making rules with the force of law, that agency interpretation may still be entitled to deference according to its persuasiveness. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Sursely v. Peake*, 551 F.3d 1351, 1355 (Fed. Cir. 2009). While this standard does not entail the same degree of deference as the *Chevron* standard, it requires courts to give some deference to informal agency interpretations of ambiguous statutes, based on "the degree of the agency's care, its consistency, formality, and relative expertness, and ... the persuasiveness of the agency's position." *Mead*, 533 U.S. at 228. The court will consider the specialized experience of the agency and "the value of uniformity in its administrative and judicial under-standings of what a national law requires." *Id.* at 234. The degree of deference afforded to an agency's informal interpretation of a statute will also

depend on its "thoroughness, logic, and expertise, its fit with prior interpretations, and any other source of weight." *Id.* at 235.

In addition, an agency's interpretation of its own regulations is entitled to substantial deference when that regulation is ambiguous or silent on the issue in question. *Price v. Panetta*, 674 F.3d 1335, 1341-42 (Fed. Cir. 2012) (citations omitted); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). That degree of deference applies even when the agency's interpretation is offered in the litigation in which the argument in favor of deference is made, as long as there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462; *see also Panetta*, 674 F.3d at 1342 (citations omitted). However, an interpretation prompted by litigation and that is unsupported by regulations, rulings, or administrative practice is not entitled to deference. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

B. The 2006 Act is silent as to its application to the FSS and as a "goal-setting" statute is ambiguous as to the discretion reserved to VA.

As noted above, under the first step of the *Chevron* analysis, the court must first determine whether Congress has spoken directly to the issue of whether VA must first determine if the "Rule of Two" is satisfied—that is, whether the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States—before ordering against the FSS.

Plaintiff principally argues that the 2006 Act is unambiguous, and thus this court's inquiry should stop at *Chevron* step one. Specifically, plaintiff contends that the plain language of the 2006 Act expresses Congress' intent that VA, for every acquisition, must conduct market research to determine whether it must set aside that procurement for SDVOSBs or VOSBs before awarding a contract using a different procurement method. Plaintiff relies on the language of § 8127(d), which states that "for the purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department *shall award* contracts on the basis of competition restricted to small business concerns owned and controlled by veterans ...." (emphasis added). Plaintiff argues that the use of the phrase "shall award" in this instance—in contrast to the use of "may award" in subsections (b) and (c) of § 8127—unequivocally establishes a mandatory set-aside. Pl.'s Mot. at 12 (citing *United States v. Thoman*, 156 U.S. 353, 360 (1895)).

Plaintiff argues that its view is supported by a line of cases concerning the HUBZone set-aside, a small business set-aside authorized by the Small Business Act, 15 U.S.C. § 657a.[9] *See generally DGR Assocs., Inc. v. United States*, 94 Fed. Cl. 189 (2010); *Mission Critical Solutions v. United States*, 91 Fed. Cl. 386, 411 (2010); *Contract Mgmt., Inc. v. Rumsfeld*, 291 F. Supp. 2d 1166 (D. Hawai'i 2003). The HUBZone cases involved the issue of whether the Small Business Act

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[9] A HUBZone is a "Historically Underutilized Business Zone." 15 U.S.C. § 632(p)(1). The purpose of the HUBZone program is to "provide Federal contracting assistance for qualified small business concerns located in historically underutilized business zones ...." FAR § 19.1301(b).

granted priority to the HUBZone program over another small business set-aside program called the Section 8(a) program, which assists small businesses owned and controlled by socially and economically disadvantaged individuals. The application of the FSS was not at issue in these cases. Rather, courts were called on to decide whether Congress, by stating that "notwithstanding any other provision of law," agencies "shall award" to qualified HUBZone businesses, intended to create a super priority for HUBZone businesses.[10] The statutory language provided:

> *Notwithstanding any other provision of law* ... a contract opportunity *shall be awarded* pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price.

15 U.S.C. § 657a(b)(2) (prior version, amended in 2010) (emphasis added); *see DGR*, 94 Fed. Cl. at 204 (holding that the Small Business Act grants priority to the HUBZone program); *Contract Mgmt.*, 291 F. Supp. 2d at 1173 (same); *Mission Critical*, 91 Fed. Cl. at 411 (holding that the HUBZone program takes priority over other small business programs). Plaintiff argues that the 2006 Act is like the HUBZone provision of the Small Business Act because it also uses the phrase "shall award" in directing the agency to award contracts based on the "Rule of Two." Plaintiff concludes

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[10] The statutory language of the Small Business Act relied on by the courts in the HUBZone cases has since been removed by an 2010 amendment.

that the 2006 Act therefore created a mandatory set-aside for SDVOSBs and VOSBs without any exceptions or exclusions.

The government contends that the 2006 Act is a goal-setting statute that does not require VA to set-aside every contract for SDVOSBs and VOSBs where two or more could provide a fair and reasonable price. Rather, the government argues, the phrase "shall award" in the 2006 Act must be read against the Act's goal-setting context. The government asserts, when read as a whole, the Act provides that a contracting officer need only use SDVOSB and VOSB set-asides when it is necessary "for purposes of meeting the goals" established by the Secretary. 38 U.S.C. § 8127(b), (c), (d). According to the government, the 2006 Act gives VA discretion to determine when it will use the set-aside procedures found in the Act to meet those goals. To interpret the statute otherwise, the government argues, would render § 8127(a), the goal-setting provision, meaningless, because a mandatory set-aside procedure would obviate the need for goals.[11]

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[11] In addition, the government contends that when the 2006 Act is read as a whole, the distinction between "may award" in subsections (b) and (c) and "shall award" in subsection (d) of § 8127 does not support plaintiff's position. Instead, the government argues, the use of "may" and "shall" in the Act distinguishes among the procedures VA may use to award contracts to SDVOSBs and VOSBs once it decides that it will set aside a contract under the Act. The government contends that a rational reading of the all of the terms of the Act demonstrates that, only when VA chooses to award a contract to meet the goals of the Act, VA is required to use restricted competition between SDVOSBs or VOSBs, unless the contracting officer decides to use the non-competitive procedures that meet the requirements outlined in sub-sections (b) and (c).

The government further argues that, given the 2006 Act's silence in regard to the FSS, VA's procurement discretion extends to its decisions to use the FSS. The government concludes that if Congress had wanted to restrict VA's discretion to use the FSS, it could have. For example, the government argues, VA's discretion could be constrained if the 2006 Act contained the phrase "notwithstanding any other provision of the law," which was included in the HUBZone provision. However, Congress did not so restrict VA's discretion in the 2006 Act.

The government also charges that its reading of the 2006 Act, as opposed to plaintiff's reading, is supported by the Act's legislative history, which "demonstrates that Congress viewed this legislation as providing contracting officers the discretion to set-aside procurements, not a mandate that they always do so." Def.'s Cross-Mot. at 15. The government argues that Congress' Joint Explanatory Statement discussing the meaning of § 8127(b)-(d) reflects Congress' intent that VA would retain discretion over choosing to set aside contracts for SDVOSBs or VOSBs:

> VA would be allowed to award non-competitive contracts to small businesses owned and controlled by veterans when the amount of the contract is below the simplified acquisition threshold as defined in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. s 403). Further, contracting officers would be allowed, but not required, to award sole source contracts to small businesses owned and controlled by veterans to meet the annual goal set by the Secretary for contracts above the simplified acquisition threshold but below $5,000,000. *Contracting officers would retain*

> *the option to restrict competition to small businesses owned and controlled by veterans* if the contracting officer has an expectation that two or more such businesses owned by veterans will submit offers for the contract including all contracts exceeding $5,000,000.

152 Cong. Rec. S11,609, S11,615 (daily ed. Dec. 8, 2006) (Joint Explanatory Statement as read into the record) (emphasis added). The Joint Explanatory Statement goes on to state:

> The intent of this provision [§ 8127] in the Compromise Agreement is to emphasize the importance of meeting the contracting goals for veteran and service-disabled veteran-owned businesses by giving those competitive parity with other set-aside categories. The Committees also seek *to give contracting officers the tools to meet veteran and service-disabled veteran-owned business set-aside goals.*
>
> The Committees anticipate that acquisition officials *will exercise reasonable judgment when attempting to meet the several set-aside goals* including giving "preference" to veteran or service-disabled veteran-owned businesses. The goals for veteran and service-disabled veteran owned businesses *are not in any way intended to prevent attainment of other set aside goals.*

Id. at S11,616 (emphasis added).

The government concludes that this legislative history clearly indicates Congress' intention to give VA the tools it needs to aid SDVOSBs and VOSBs in obtaining VA contracts when and if VA chooses to set

aside a contract to meet the 2006 Act's goals. Nothing in the legislative history, the government argues, suggests an intention by Congress to establish a mandatory set-aside program that would frustrate VA's attainment of other set-aside goals or limit its use of the FSS.

After consideration of the parties' arguments, the court agrees with the government that plaintiff's interpretation of the 2006 Act is not supported by the plain language of the Act. First, the 2006 Act must be construed in light of its goal-setting provisions and thus the statute is at best ambiguous as to whether it mandates a preference for SDVOSBs and VOSBs for all VA procurements. More specifically, the phrase "shall award" must be read in connection with the other terms in the 2006 Act, which demonstrate that the Act is goal-setting in nature: Subsection (a) of § 8127 directs the Secretary to set goals for SDVOSB and VOSB participation in VA contracts, and the sole source and set-aside requirements in the remainder of § 8127 are couched in terms of meeting those goals. *See* 38 U.S.C. § 8127(b), (c), and (d) (each qualifying its terms with the phrase "for purposes of meeting the goals of subsection (a)"). The Secretary's discretion to set contracting goals for SDVOSBs and VOSBs under the Act contradicts plaintiff's interpretation of the statute as creating a mandatory SDVOSB and VOSB set-aside procedure for each and every procurement. Contrary to plaintiff's argument, the goal-setting nature of the statute clouds the clarity plaintiff would attribute to the phrase "shall award" in subsection (d) of the Act, and renders the Act ambiguous as to its application to other procurement vehicles, such as the FSS.

Second, the 2006 Act is silent as to the relationship between its set-aside provision and the FSS and thus the specific issue in this case is not answered by the

plain words of the statute. In this connection, the court notes that, generally, the FSS is exempted from small business set-aside requirements under the FAR. *See* FAR §§ 8.404(a), 8.405-5(a), 19.502-1(b). In addition, the court cannot ignore the well-settled principle that Congress "can be presumed [to be] ... knowledgeable about existing law pertinent to legislation it enacts." *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1581 (Fed. Cir. 1990) (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988)). Thus, in enacting the 2006 Act, the court must presume that Congress was aware of the historic exception of the FSS from small business set-asides and cannot presume, as plaintiff urges, that Congress intended to extinguish the exception by its silence.[12] The effect of the Act on FSS orders is a legislative gap left for the agency to fill.[13]

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[12] In this regard, the court rejects the GAO's analysis in *Aldevra*, where the GAO held that because FAR Part 19's SDVOSB set-aside provision was created as a government-wide program by the Veterans Benefit Act of 2003, "the exception in the FAR that permits agencies to award task and delivery orders under the FSS without regard to government-wide small business programs ... does not govern, or apply to, the SDVOSB set-aside program created by the Veterans Benefits, Health Care, and Information Technology Act of 2006." *Aldevra*, 2011 WL 4826148, at *4. While the Veterans Benefit Act of 2003 and the 2006 Act do create distinct set-aside programs, the 2006 Act itself is silent as to the relationship between its set-aside provision and the FSS. Therefore, the agency retained its discretion to determine whether and how the 2006 Act's set-aside procedures apply to FSS procurements, and, as discussed *infra*, reasonably concluded that, based on the traditional exemption of the FSS from small business set-asides, it would not apply the 2006 Act's terms to FSS orders.

[13] Legislation has since been proposed in the House of Representatives to "clarify the contracting goals and preferences of the Department of Veterans Affairs with respect to small business

Further, the legislative history of the Act undermines plaintiff's interpretation of the 2006 Act. The Joint Explanatory Statement accompanying the 2006 Act states that VA contracting officers "would retain the option to restrict competition to small businesses owned and controlled by veterans" if the "Rule of Two" is met, and that the Act was meant to give VA the "tools" to meet its SDVOSB and VOSB set-aside goals, but not to the detriment of other set-aside goals.[14] 152 Cong. Rec. at S11,615-16. Plaintiff's man-

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concerns owned and controlled by veterans." H.R. 4048, 112th Cong. § 2 (2012). That bill proposes to amend 38 U.S.C. § 8127 to insert the following section:

> (k) Applicability to Federal Supply Schedule—For purposes of meeting the goals under subsection (a), the Secretary shall include the acquisition of goods and services through the use of a Federal supply schedule of the General Services Administration.

Id.

[14] To the extent plaintiff relies on legislative history about the 2006 Act that occurred *subsequent* to the passage of the Act to argue to the contrary, the court agrees with the government that subsequent legislative history is not useful in determining the intent of the Congress that initially passed the 2006 Act. *See Colt Indus., Inc. v. United States*, 880 F.2d 1311, 1313 n.** (Fed. Cir. 1989) ("Subsequent legislative history is worthy of little weight."); *Huffman v. Office of Personnel Mgmt.*, 263 F.3d 1341, 1348 (Fed. Cir. 2001) ("It is well-established that 'the view of a later Congress cannot control the interpretation of an earlier enacted statute.'" (citing *inter alia O'Gilvie v. United States*, 519 U.S. 79, 90 (1996)).

In fact, the legislative history cited by plaintiff, which addresses whether the terms of the Act apply to FSS orders, serves to confirm that the statute is ambiguous in regard to this point. *See, e.g.*, Follow-up on the U.S. Department of Veterans Affairs Service-Disabled Veteran-Owned Small Business Certification Process: Hearing Before the Subcomm. on Oversight and Investigations and Subcomm. on Economic Opportunity of the H. Comm.

datory set-aside interpretation conflicts with the stated purpose of the Act in its legislative history.

Finally, the court finds that plaintiff's reliance on the HUBZone cases is misplaced. As an initial matter, as noted above, the HUBZone cases dealt with conflicting set-aside preferences under the Small Business Act, not the relationship between set-asides and procurement vehicles, such as the FSS. Moreover, the courts, in determining that the HUBZone set-aside program took priority over other set-aside programs in the Small Business Act, relied on the "shall be awarded" language in that statute as used in conjunction with the phrase "notwithstanding any other provision of law." *See DGR*, 94 Fed. Cl. at 206 ("It is the combination of the two phrases that creates a clear priority for the HUBZone program over the 8(a) program when the standards of the HUBZone program are satisfied."). The 2006 Act does not contain a similar unequivocal phrase that would operate to foreclose use of the FSS prior to satisfying the requirements of § 8127(d).

Taken as a whole, therefore, the court concludes that under *Chevron* step one, the 2006 Act is not plain on its face as to its application to the FSS and is ambiguous with regard to the discretion left to VA in meeting the 2006 Act's goals. The court must now ask whether the implementing agency's interpretation of the statute is reasonable. *Chevron*, 467 U.S. at 843. In this case, the court must determine if VA reasonably exercised the discretion afforded under the Act in deciding that the restricted competition provision of § 8127(d) would

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on Veterans' Affairs, 112th Cong. 19 (Nov. 30, 2011) (question of Bill Johnson, Chairman, H. Subcomm. on Oversight and Investigations) ("[The statute] does not talk about the Federal supply schedule or any of that.").

not operate to bar VA's use of the FSS to meet its procurement needs.

C. VA's interpretation of the 2006 Act is reasonable.

Plaintiff argues that, to the extent the language in the 2006 Act is ambiguous, VA has written an implementing regulation that clarifies this ambiguity by requiring VA to consider SDVOSB and VOSB set-asides for all acquisitions. In particular, plaintiff points to VAAR § 819.7005, which states:

> (a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106 [involving contracts exceeding the micro-purchase threshold up to $5 million], 819.7007 [involving awards to SDVOSBs of under $5 million on a sole source basis] and 819.7008 [involving awards to VOSBs of under $5 million on a sole source basis], *the contracting officer shall set-aside an acquisition for competition restricted to SDVOSB* concerns upon a reasonable expectation that,
>
> (1) Offers will be received from two or more eligible SDVOSB concerns; and
>
> (2) Award will be made at a fair and reasonable price.

Id. (emphasis added). Plaintiff argues that the language "the contracting officer shall set-aside an acquisition for competition restricted to SDVOSB concerns" clearly creates a mandatory set-aside without any exceptions, and that this interpretation by VA, found in its regulations, is entitled to deference. Any other interpretation by VA, plaintiff argues, was developed on-

ly for the purposes of litigation and is not entitled to deference.

The government argues that plaintiff has mischaracterized the VAAR and that VA has reasonably decided to exclude FSS orders from application of the 2006 Act. The government asserts that VA's interpretation of the 2006 Act, as expressed in the preamble to the VAAR, is consistent with the statutory language and legislative history of the 2006 Act, which indicate that VA need not set aside each and every contract for SDVOSBs and VOSBs before ordering against the FSS. In regard to FSS procurements in particular, VA in the preamble of the final VAAR states:

> Comment: VA received a comment stating that the proposed rule was unclear whether it was intended to be applicable to task and delivery orders under the Federal Supply Schedule (FSS). The commenter indicated that although GSA has delegated to VA the authority to administer certain schedules, the delegation does not extend to policy implementation. The commenter recommended a revision stating that SDVOSB and VOSB set-asides and sole source provisions do not apply at the FSS order level.
>
> Response: We disagree with the commenter and reject the suggestion because *this rule does not apply to FSS task or delivery orders.* VA does not believe a change to the regulation is needed, and 48 CFR part 8 procedures in the FAR will continue to apply to VA FSS task/delivery orders. Further, *VA will continue to follow GSA guidance regarding applicability of 48 CFR part 19 of the FAR, Small*

Business Programs, which states that set-asides do not apply to FAR part 8 FSS acquisitions.

VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009) (emphasis added). The government asserts that VA's position that the 2006 Act's regulations "do[] not apply to FSS task or delivery orders" is reasonable, and entitled to deference. The court agrees.

As the government argues, the VAAR are silent as to the role of the FSS in relation to the set-aside program established by the 2006 Act. Where the text of a regulation is unclear or silent, the court may look to the preamble of the regulation to determine the administrative construction of a regulation. *See Fidelity Fed. Sav. and Loan Ass'n v. Cuesta*, 458 U.S. 141, 158 n.13 (1982); *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) ("Although the preamble does not 'control' the meaning of the regulation, it may serve as a source of evidence concerning contemporaneous agency intent."). As noted above, the preamble accompanying the final VAAR states that the VAAR "do[] not apply to FSS task or delivery orders," and that the regulatory framework of FAR Part 8 will continue to apply to VA's FSS orders. VA Acquisition Regulation, 74 Fed. Reg. at 64,624. The preamble further asserts, "Under this final rule, a VA contracting officer *may restrict competition* to contracting with SDVOSBs or VOSBs under certain conditions. *Likewise*, sole source contracts with SDVOSBs or VOSBs are permissible under certain conditions. This final rule implements these special acquisition methods as a change to the VA Acquisition Regulation (VAAR)." *Id.* at 64,619 (emphasis added). In explaining the reasons

for its rules, VA states in the preamble, "Specifically, this final rule *will allow VA contracting officers to* ... [r]equire set-asides for SDVOSBs or VOSBs above the simplified acquisition threshold when the contracting officer has a reasonable expectation that two or more eligible SDVOSBs or VOSBs will submit offers and that the award can be made at a fair and reasonable price that offers the best value to the United States."[15] *Id.* at 64,628 (emphasis added).

The court recognizes that the preamble to the regulations lacks the formality of the regulations themselves, and is therefore not entitled to *Chevron* deference.[16] However, the agency's interpretation of the statute found in the preamble is still entitled to deference in so far as it has "the power to persuade," *Skidmore*, 323 U.S. at 140, based on the agency's consistency, formality, expertise and if the agency's determination fits with prior interpretations. *See Mead*, 533 U.S. at 228, 234-35.

VA's interpretation of its rules in the preamble indicate that VA interpreted the terms of the Act, and the VAAR, as having no effect on its ability to use the FSS without limitation. The court finds that this inter-

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[15] Similar language to the preamble of the final VAAR is found in the preamble to VA's proposed rules. *See* VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses, 73 Fed. Reg. 49,141, 49,144 (Aug. 20, 2008).

[16] In this regard, because both the statute and the regulations are silent as to the role of the FSS, the court construes the statement in the preamble to ultimately interpret the statute itself, not just the VAAR. However, to the extent that VA is interpreting its own regulations rather than the meaning of the statute in the preamble, that interpretation is entitled to substantial deference. *Auer*, 519 U.S. at 461-63; *Sursely*, 551 F.3d at 1355.

pretation is a reasonable use of the discretion implicitly granted by the statute, and is entitled to deference. VA's interpretation in the preamble has many of the characteristics favoring deference under *Skidmore v. Swift & Co.* First, VA's interpretation that the set-aside provisions of the 2006 Act do not apply to the FSS has remained consistent over time, and reflects a uniform approach on the part of the agency.[17] *Mead*, 533 U.S. at 234. Second, VA's interpretation is not directly in conflict with the Act or the VAAR, which are silent on the role of the FSS in meeting the goals set by the Secretary. VA's interpretation of its abilities under the Act is also consistent with the legislative history of the Act, which expresses the intent that VA retain "options" to award contracts to SDVOSBs and VOSBs, and that VA would "exercise reasonable judgment" in meeting the Act's set-aside goals alongside VA's other small business goal obligations. Third, while VA's explanation of its interpretation of the Act, found in the preamble, is brief, it made clear the basis of VA's position—the traditional exemption of the FSS from set-

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[17] Plaintiff argues that the government's particular position that it retains discretion to use the set-aside procurement methods in § 8127 of the Act if it chooses to meet the goals of the Act is a position developed only for litigation. However, because the government's argument is based, at bottom, on VA's preamble to its final rule, the court rejects this aspect of plaintiff's argument. Moreover, the VA press release plaintiff cites for the proposition that VA changed its position is consistent with VA's current position, stating that the 2006 Act "gave VA new authority 'for purposes of meeting [its] goals' for contracting with" SDVOSBs and VOSBs. Pl.'s Resp., Ex. 2. Finally, as noted above, to the extent that VA is interpreting its own regulations rather than the meaning of the statute in the preamble, that interpretation is entitled to substantial deference even if developed for litigation. *See supra* note 16.

aside programs—and was promulgated in the context of a notice-and-comment rulemaking procedure. Finally, VA's interpretation is consistent with the traditional relationship between set-asides and the FSS found in the FAR—namely, that agencies are not required to implement set-aside programs before or while using the FSS. *See K-Lak*, 98 Fed. Cl. at 8. Under these circumstances, the court finds that VA's interpretation of the statute, a reasoned interpretation made in the context of its notice-and-comment rule-making procedures, is entitled to deference.

In sum, the court respectfully disagrees with the GAO's interpretation of the 2006 Act in the case at hand, and finds that VA's decision not to set aside the ENS contract at issue was not arbitrary, capricious, or contrary to law. The government is therefore entitled to judgment on the stipulated facts as to this particular procurement action.

V. CONCLUSION

For the foregoing reasons, plaintiff's motion for judgment on the stipulated facts is **DENIED**, and the government's cross-motion is **GRANTED**. The parties shall submit a status report by **December 10, 2012** indicating next steps in this litigation regarding plaintiff's two remaining bid protest claims. In addition, the parties shall indicate in that same status report whether they would like the court to direct entry of judgment under Rule 54(b) of the Rules of the United States Court of Federal Claims.

IT IS SO ORDERED.

/s/ Nancy B. Firestone
NANCY B. FIRESTONE
JUDGE

APPENDIX C

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2013-5042

KINGDOMWARE TECHNOLOGIES, INC.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

ON PETITION FOR REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, CLEVENGER,[1] DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, and CHEN, *Circuit Judges*.*

PER CURIAM.

ORDER

Appellant Kingdomware Technologies, Inc. filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by appellee United States. The petition was first referred as a pe-

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[1] Circuit Judge Clevenger participated only in the decision on the petition for panel rehearing.

* Circuit Judge Hughes did not participate.

tition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on September 17, 2014.

FOR THE COURT

September 10, 2014
Date

/s/ Daniel E. O'Toole
Daniel E. O'Toole
Clerk of Court

APPENDIX D

UNITED STATES COURT OF
FEDERAL CLAIMS

No. 12-173C

KINGDOMWARE TECHNOLOGIES, INC.

v.

UNITED STATES

JUDGMENT

Pursuant to the court's Order for Entry of Judgment, filed December 12, 2012,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is in favor of defendant as to all three of the procurements identified in plaintiff's amended complaint. Each party shall bear its own costs.

Hazel C. Keahey
Clerk of Court

December 18, 2012 By: s/ Lisa L. Reyes
Deputy Clerk

APPENDIX E

STATUTES AND REGULATIONS

15 U.S.C. § 644. Awards or contacts

* * *

(g) Goals for participation of small business concerns in procurement contracts

(1) The President shall annually establish Government-wide goals for procurement contracts awarded to small business concerns, small business concerns owned and controlled by service disabled[1] veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women. The Government-wide goal for participation by small business concerns shall be established at not less than 23 percent of the total value of all prime contract awards for each fiscal year. The Government-wide goal for participation by small business concerns owned and controlled by service-disabled veterans shall be established at not less than 3 percent of the total value of all prime contract and subcontract awards for each fiscal year.

* * *

Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economical-

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[1] So in original. Probably should be "service-disabled".

ly disadvantaged individuals, and small business concerns owned and controlled by women to participate in the performance of contracts let by such agency. The Administration and the Administrator for Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Government-wide prime contract goal established by the President pursuant to this paragraph.

(2)(A) The head of each Federal agency shall, after consultation with the Administration, establish goals for the participation by small business concerns, by small business concerns owned and controlled by service-disabled veterans, by qualified HUBZone small business concerns, by small business concerns owned and controlled by socially and economically disadvantaged individuals, and by small business concerns owned and controlled by women in procurement contracts of such agency.

(B) Goals established under this subsection shall be jointly established by the Administration and the head of each Federal agency and shall realistically reflect the potential of small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to perform such contracts and to perform subcontracts under such contracts.

(C) Whenever the Administration and the head of any Federal agency fail to agree on established goals, the disagreement shall be submitted to the Administrator for Federal Procurement Policy for final determination.

(D) For the purpose of establishing goals under this subsection, the head of each Federal agency shall make consistent efforts to annually expand participation by small business concerns from each industry category in procurement contracts of the agency, including participation by small business concerns owned and controlled by service-disabled veterans, by qualified HUBZone small business concerns, by small business concerns owned and controlled by socially and economically disadvantaged individuals, and by small business concerns owned and controlled by women.

(E) The head of each Federal agency, in attempting to attain the participation described in subparagraph (D), shall consider—

(i) contracts awarded as the result of unrestricted competition; and

(ii) contracts awarded after competition restricted to eligible small business concerns under this section and under the program established under section 637(a) of this title.

(F)(i) Each procurement employee or program manager described in clause (ii) shall communicate to the subordinates of the procurement employee or program manager the importance of achieving small business goals.

(ii) A procurement employee or program manager described in this clause is a senior procurement executive, senior program manager, or Director of Small and Disadvantaged Business Utilization of a Federal agency having contracting authority.

15 U.S.C. § 657f. Procurement programs for small business concerns owned and controlled by service-disabled veterans

(a) Sole source contracts

In accordance with this section, a contracting officer may award a sole source contract to any small business concern owned and controlled by service-disabled veterans if—

(1) such concern is determined to be a responsible contractor with respect to performance of such contract opportunity and the contracting officer does not have a reasonable expectation that 2 or more small business concerns owned and controlled by service-disabled veterans will submit offers for the contracting opportunity;

(2) the anticipated award price of the contract (including options) will not exceed—

(A) $5,000,000, in the case of a contract opportunity assigned a standard industrial classification code for manufacturing; or

(B) $3,000,000, in the case of any other contract opportunity; and

(3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price.

(b) Restricted competition

In accordance with this section, a contracting officer may award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by ser-

vice-disabled veterans will submit offers and that the award can be made at a fair market price.

(c) Relationship to other contracting preferences

A procurement may not be made from a source on the basis of a preference provided under subsection (a) or (b) of this section if the procurement would otherwise be made from a different source under section 4124 or 4125 of title 18 or chapter 85 of title 41.

(d) Enforcement; penalties

Rules similar to the rules of paragraphs (5) and (6) of section 637(m) of this title shall apply for purposes of this section.

(e) Contracting officer

For purposes of this section, the term "contracting officer" has the meaning given such term in section 2101(1) of title 41.

38 U.S.C. § 8127. Small business concerns owned and controlled by veterans: contracting goals and preferences

(a) CONTRACTING GOALS.—(1) In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities, the Secretary shall—

(A) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans who are not veterans with service-connected disabilities in accordance with paragraph (2); and

(B) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans with service-connected disabilities in accordance with paragraph (3).

(2) The goal for a fiscal year for participation under paragraph (1)(A) shall be determined by the Secretary.

(3) The goal for a fiscal year for participation under paragraph (1)(B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)).

(4) The Secretary shall establish a review mechanism to ensure that, in the case of a subcontract of a Department contract that is counted for purposes of meeting a goal established pursuant to this section, the subcontract was actually awarded to a business concern that may be counted for purposes of meeting that goal.

(b) USE OF NONCOMPETITIVE PROCEDURES FOR CERTAIN SMALL CONTRACTS.—For purposes of meeting the goals under subsection (a), and in accordance with this section, in entering into a contract with a small business concern owned and controlled by veterans for an amount less than the simplified acquisition threshold (as defined in section 134 of title 41), a contracting officer of the Department may use procedures other than competitive procedures.

(c) SOLE SOURCE CONTRACTS FOR CONTRACTS ABOVE SIMPLIFIED ACQUISITION THRESHOLD.—For purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department may award a contract to a small busi-

ness concern owned and controlled by veterans using procedures other than competitive procedures if—

(1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;

(2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 134 of title 41) but will not exceed $5,000,000; and

(3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

(d) USE OF RESTRICTED COMPETITION.—Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

(e) ELIGIBILITY OF SMALL BUSINESS CONCERNS.—A small business concern may be awarded a contract under this section only if the small business concern and the veteran owner of the small business concern are listed in the database of veteran-owned businesses maintained by the Secretary under subsection (f).

(f) DATABASE OF VETERAN-OWNED BUSINESSES.—(1) Subject to paragraphs (2) through (6), the Secretary shall maintain a database of small business con-

cerns owned and controlled by veterans and the veteran owners of such business concerns.

(2)(A) To be eligible for inclusion in the database, such a veteran shall submit to the Secretary such information as the Secretary may require with respect to the small business concern or the veteran. Application for inclusion in the database shall constitute permission under section 552a of title 5 (commonly referred to as the Privacy Act) for the Secretary to access such personal information maintained by the Secretary as may be necessary to verify the information contained in the application.

(B) If the Secretary receives an application for inclusion in the database from an individual whose status as a veteran cannot be verified because the Secretary does not maintain information with respect to the veteran status of the individual, the Secretary may not include the small business concern owned and controlled by the individual in the database maintained by the Secretary until the Secretary receives such information as may be necessary to verify that the individual is a veteran.

(3) Information maintained in the database shall be submitted on a voluntary basis by such veterans.

(4) No small business concern may be listed in the database until the Secretary has verified that—

(A) the small business concern is owned and controlled by veterans; and

(B) in the case of a small business concern for which the person who owns and controls the concern indicates that the person is a veteran with a service-connected disability, that the person is a veteran with a service-connected disability.

(5) The Secretary shall make the database available to all Federal departments and agencies and shall notify each such department and agency of the availability of the database.

(6) If the Secretary determines that the public dissemination of certain types of information maintained in the database is inappropriate, the Secretary shall take such steps as are necessary to maintain such types of information in a secure and confidential manner.

(g) ENFORCEMENT PENALTIES FOR MISREPRESENTATION.—(1) Any business concern that is determined by the Secretary to have willfully and intentionally misrepresented the status of that concern as a small business concern owned and controlled by veterans or as a small business concern owned and controlled by service-disabled veterans for purposes of this subsection shall be debarred from contracting with the Department for a period of not less than five years.

(2) In the case of a debarment under paragraph (1), the Secretary shall commence debarment action against the business concern by not later than 30 days after determining that the concern willfully and intentionally misrepresented the status of the concern as described in paragraph (1) and shall complete debarment actions against such concern by not later than 90 days after such determination.

(3) The debarment of a business concern under paragraph (1) includes the debarment of all principals in the business concern for a period of not less than five years.

(h) TREATMENT OF BUSINESSES AFTER DEATH OF VETERAN-OWNER.—(1) Subject to paragraph (3), if the death of a veteran causes a small business concern to be less than 51 percent owned by one or more veterans,

the surviving spouse of such veteran who acquires ownership rights in such small business concern shall, for the period described in paragraph (2), be treated as if the surviving spouse were that veteran for the purpose of maintaining the status of the small business concern as a small business concern owned and controlled by veterans.

(2) The period referred to in paragraph (1) is the period beginning on the date on which the veteran dies and ending on the earliest of the following dates:

(A) The date on which the surviving spouse remarries.

(B) The date on which the surviving spouse relinquishes an ownership interest in the small business concern.

(C) The date that is ten years after the date of the veteran's death.

(3) Paragraph (1) only applies to a surviving spouse of a veteran with a service-connected disability rated as 100 percent disabling or who dies as a result of a service-connected disability.

(i) PRIORITY FOR CONTRACTING PREFERENCES.—Preferences for awarding contracts to small business concerns shall be applied in the following order of priority:

(1) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and controlled by veterans with service-connected disabilities.

(2) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and

controlled by veterans that are not covered by paragraph (1).

(3) Contracts awarded pursuant to—

(A) section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(B) section 31 of such Act (15 U.S.C. 657a).

(4) Contracts awarded pursuant to any other small business contracting preference.

(j) APPLICABILITY OF REQUIREMENTS TO CONTRACTS.—(1) If after December 31, 2008, the Secretary enters into a contract, memorandum of understanding, agreement, or other arrangement with any governmental entity to acquire goods or services, the Secretary shall include in such contract, memorandum, agreement, or other arrangement a requirement that the entity will comply, to the maximum extent feasible, with the provisions of this section in acquiring such goods or services.

(2) Nothing in this subsection shall be construed to supersede or otherwise affect the authorities provided under the Small Business Act (15 U.S.C. 631 et seq.).

(k) ANNUAL REPORTS.—Not later than December 31 each year, the Secretary shall submit to Congress a report on small business contracting during the fiscal year ending in such year. Each report shall include, for the fiscal year covered by such report, the following:

(1) The percentage of the total amount of all contracts awarded by the Department during that fiscal year that were awarded to small business concerns owned and controlled by veterans.

(2) The percentage of the total amount of all such contracts awarded to small business concerns

owned and controlled by veterans with service-connected disabilities.

(3) The percentage of the total amount of all contracts awarded by each Administration of the Department during that fiscal year that were awarded to small business concerns owned and controlled by veterans.

(4) The percentage of the total amount of all contracts awarded by each such Administration during that fiscal year that were awarded to small business concerns owned and controlled by veterans with service-connected disabilities.

(*l*) DEFINITIONS.—In this section:

(1) The term "small business concern" has the meaning given that term under section 3 of the Small Business Act (15 U.S.C. 632).

(2) The term "small business concern owned and controlled by veterans" means a small business concern—

(A)(i) not less than 51 percent of which is owned by one or more veterans or, in the case of a publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and

(ii) the management and daily business operations of which are controlled by one or more veterans; or

(B) not less than 51 percent of which is owned by one or more veterans with service-connected disabilities that are permanent and total who are unable to manage the daily business operations of such concern or, in the case of a publicly owned

business, not less than 51 percent of the stock of which is owned by one or more such veterans.

38 U.S.C. § 8128. Small business concerns owned and controlled by veterans: contracting priority

(a) CONTRACTING PRIORITY.—In procuring goods and services pursuant to a contracting preference under this title or any other provision of law, the Secretary shall give priority to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference.

(b) DEFINITION.—For purposes of this section, the term "small business concern owned and controlled by veterans" means a small business concern that is included in the small business database maintained by the Secretary under section 8127(f) of this title.

48 C.F.R. Subpart 819.70. Service-Disabled Veteran-Owned and Veteran-Owned Small Business Acquisition Program

819.7001 General.

(a) Sections 502 and 503 of the Veterans Benefits, Health Care, and Information Technology Act of 2006 (38 U.S.C. 8127-8128), created an acquisition program for small business concerns owned and controlled by service-disabled veterans and those owned and controlled by veterans for VA.

(b) The purpose of the program is to provide contracting assistance to SDVOSBs and VOSBs.

819.7002 Applicability.

This subpart applies to VA contracting activities and to its prime contractors. Also, this subpart applies to any government entity that has a contract, memorandum of understanding, agreement, or other arrangement with VA to acquire goods and services for VA in accordance with 817.502.

819.7003 Eligibility.

(a) Eligibility of SDVOSBs and VOSBs continues to be governed by the Small Business Administration regulations, 13 CFR subparts 125.8 through 125.13, as well as the FAR, except where expressly directed otherwise by the VAAR, and 38 CFR verification regulations for SDVOSBs and VOSBs.

(b) At the time of submission of offer, the offeror must represent to the contracting officer that it is a—

(1) SDVOSB concern or VOSB concern;

(2) Small business concern under the North American Industry Classification System (NAICS) code assigned to the acquisition; and

(3) Verified for eligibility in the VIP database.

(c) A joint venture may be considered an SDVOSB or VOSB concern if

(1) At least one member of the joint venture is an SDVOSB or VOSB concern, and makes the representations in paragraph (b) of this section;

(2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement;

(3) The joint venture meets the requirements of paragraph 7 of the size standard explanation of affiliates in FAR 19.101; and

(4) The joint venture meets the requirements of 13 CFR 125.15(b), modified to include veteran-owned small businesses where this CFR section refers to SDVOSB concerns.

(d) Any SDVOSB or VOSB concern (nonmanufacturer) must meet the requirements in FAR 19.102(f) to receive a benefit under this program.

819.7004 Contracting Order of Priority.

In determining the acquisition strategy applicable to an acquisition, the contracting officer shall consider, in the following order of priority, contracting preferences that ensure contracts will be awarded:

(a) To SDVOSBs;

(b) To VOSB, including but not limited to SDVOSBs;

(c) Pursuant to—

(1) Section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(2) The Historically-Underutilized Business Zone (HUBZone) Program (15 U.S.C. 657a); and

(d) Pursuant to any other small business contracting preference.

819.7005 Service-disabled veteran-owned small business set-aside procedures.

(a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the

contracting officer shall set-aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that,

(1) Offers will be received from two or more eligible SDVOSB concerns; and

(2) Award will be made at a fair and reasonable price.

(b) When conducting SDVOSB set-asides, the contracting officer shall ensure:

(1) Eligibility is extended to businesses owned and operated by surviving spouses; and

(2) Businesses are registered and verified as eligible in the VIP database prior to making an award.

(c) If the contracting officer receives only one acceptable offer at a fair and reasonable price from an eligible SDVOSB concern in response to a SDVOSB set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from eligible SDVOSB concerns, the set-aside shall be withdrawn and the requirement, if still valid, set aside for VOSB competition, if appropriate.

819.7006 Veteran-owned small business set-aside procedures.

(a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer shall set aside an acquisition for competition restricted to VOSB concerns upon a reasonable expectation that:

(1) Offers will be received from two or more eligible VOSB concerns; and

(2) Award will be made at a fair and reasonable price.

(b) If the contracting officer receives only one acceptable offer at a fair and reasonable price from an eligible VOSB concern in response to a VOSB set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from eligible VOSB concerns, the set-aside shall be withdrawn and the requirement, if still valid, set aside for other small business programs, as appropriate.

(c) When conducting VOSB set-asides, the contracting officer shall ensure the business is registered and verified as eligible in the VIP database prior to making an award.

819.7007 Sole source awards to service-disabled veteran-owned small business concerns.

(a) A contracting officer may award contracts to SDVOSB concerns on a sole source basis provided:

(1) The anticipated award price of the contract (including options) will not exceed $5 million;

(2) The requirement is synopsized in accordance with FAR part 5;

(3) The SDVOSB concern has been determined to be a responsible contractor with respect to performance; and

(4) Award can be made at a fair and reasonable price.

(b) The contracting officer's determination whether to make a sole source award is a business decision wholly within the discretion of the contracting officer.

A determination that only one SDVOSB concern is available to meet the requirement is not required.

(c) When conducting a SDVOSB sole source acquisition, the contracting officer shall ensure businesses are registered and verified as eligible in the VIP database prior to making an award.

819.7008 Sole source awards to veteran-owned small business concerns.

(a) A contracting officer may award contracts to VOSB concerns on a sole source basis provided:

(1) The anticipated award price of the contract (including options) will not exceed $5 million;

(2) The requirement is synopsized in accordance with FAR part 5;

(3) The VOSB concern has been determined to be a responsible contractor with respect to performance;

(4) Award can be made at a fair and reasonable price; and

(5) No responsible SDVOSB concern has been identified.

(b) The contracting officer's determination whether to make a sole source award is a business decision wholly within the discretion of the contracting officer. A determination that only one VOSB concern is available to meet the requirement is not required.

(c) When conducting a VOSB sole source acquisition, the contracting officer shall ensure businesses are registered and verified as eligible in the VIP database prior to making an award.

819.7009 Contract clauses.

The contracting officer shall insert VAAR clause 852.219-10, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside or 852.219-11, Notice of Total Veteran-Owned Small Business Set-Aside in solicitations and contracts for acquisitions under this subpart.